Supreme Court, U.S.
FILED

941101 DEC 20 1994

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CASE NO.

in the Supreme Court of the United States

OCTOBER TERM, 1994

CHRISTIAN W. SCHMIDGALL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.

DID THE COURT OF APPEALS ERRONEOUSLY AFFIRM THE DENIAL OF SCHMIDGALL'S MOTION TO DISMISS THE INDICTMENT FOR A *KASTIGAR* VIOLATION WHERE BOTH THE PROSECUTOR AND THE CASE AGENT AGAINST SCHMIDGALL HAD BEEN EXPOSED TO SCHMIDGALL'S IMMUNIZED STATEMENTS BY VARIOUS MEANS BUT HAD FAILED TO SEGREGATE THEMSELVES OR THE IMMUNIZED STATEMENTS FROM THE INVESTIGATION OF THE CASE AGAINST SCHMIDGALL?

II.

DID THE TRIAL AND APPELLATE COURTS APPLY AN INCORRECT STANDARD FOR DETERMINING HARMLESS ERROR WHEN THEY CONCLUDED THAT THE INTRODUCTION BEFORE A GRAND JURY OF INFORMATION TAINTED BY A *KASTIGAR* VIOLATION COULD BE HARMLESS?

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REPORT OF OPINION BELOW

The opinion below is reported as *United States v. Schmidgall*, 25 F.3rd 1533 (11th Cir. 1994). The opinion in the companion case to the case below, reference to which may be necessary in deciding this petition, is reported as *United States v. Schmidgall*, 25 F.3rd 1523 (11th Cir. 1994).

STATEMENT OF JURISDICTION

The Petitioner CHRISTIAN W. SCHMIDGALL seeks certiorari review, pursuant to Title 28, United States Code, Section 1254(1), of the opinion and judgment of the United States Court of Appeals for the Eleventh Circuit of July 14, 1994. The Eleventh Circuit affirmed the Petitioner's conviction and sentence. The Petitioner timely filed both a petition for rehearing and a suggestion for rehearing en banc. The Eleventh Circuit denied both rehearing and rehearing en banc by its order of September 23, 1994. (A. 86).

APPLICABLE CONSTITUTIONAL PROVISIONS

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

STATEMENT OF THE CASE

The Petitioner CHRISTIAN W. SCHMIDGALL gave statements to government agents on January 26, 1988 in Miami, Florida and on December 5, 1988 in Birmingham, Alabama. (Appendix 8, 9-10, 24, 26). Both statements concerned, among other topics, a drug smuggling venture that had taken place in Sumter County, Alabama in December of 1985. (App. 6, 8, 9, 71). SCHMIDGALL acted as a radio operator for the smugglers during this venture. (App. 9). The government below conceded that SCHMIDGALL had received use and derivative use immunity for the January 1988 statement. (App. 8, 24). The government at first asserted that SCHMIDGALL had not received immunity for his December 5, 1988 statement. (App. 58). The district court eventually found, however, that SCHMIDGALL had received use and derivative use immunity for the December 1988 statement as well as for the January 1988 statement. (App. 59, 60).

The prosecutor below, Assistant United States Attorney Robert J. McLean, was present when SCHMIDGALL gave his December 1988 statement. Thomas Coram, the case agent and the eventual grand jury witness against SCHMIDGALL, was also present. (App. 9, 61). Coram prepared a written report summarizing SCHMIDGALL'S December 1988 statement.

Coram and McLean had not been present when SCHMIDGALL gave his first statement in January of 1988. During the period between SCHMIDGALL'S first and second statements, however, Coram and McLean did communicate with other government agents who had been present when SCHMIDGALL gave the first statement. Coram discussed SCHMIDGALL'S involvement in the case with United States Coast Guard Lieutenant David Hume and with United States Customs Service Agent Ronald

Ingleby, both of whom had been present when SCHMIDGALL gave his first statement. (App. 10n.4, 61-62). McLean discussed the case with Ingleby. McLean also discussed the case with United States Customs Service agent Donald Schmidt. (App. 10n.4, 62). Schmidt had not attended SCHMIDGALL'S first statement in person, but had reviewed handwritten notes of it. (App. 25, 31). Coram reviewed reports of witness interviews Schmidt had made after reviewing the notes of SCHMIDGALL'S first statement. (App. 10n.4).

During the period between SCHMIDGALL'S first and second statements McLean and Coram investigated and prepared a case against SCHMIDGALL. They continued their investigation after SCHMIDGALL gave his second immunized statement in December of 1988. For example, Coram interviewed witness Steven Purvis in August or September of 1989, months after SCHMIDGALL had given his second statement. (App. 10).

McLean did not at first realize that he had given SCHMIDGALL immunity at the December 5, 1988 interview or that SCHMIDGALL had received immunity for the January 1988 statement. McLean did not realize that SCHMIDGALL might have immunity until August of 1989. At that time he testified at a *Kastigar* hearing in Mobile, Alabama in another case against SCHMIDGALL. Only after testifying at the hearing in Mobile did McLean realize that use of information derived from SCHMIDGALL'S statements might be prohibited and that he might have to segregate information derived from SCHMIDGALL'S statements from other information in the case.

Coram received no instructions from McLean about the use of SCHMIDGALL'S statements until December of 1990, immediately before he appeared before a grand jury

to testify against SCHMIDGALL. Only then did McLean advise Coram not to use any information derived from SCHMIDGALL'S statements. (App. 10n.4, 61). Thus, Coram did not know that SCHMIDGALL might have immunity for a period of almost two years after SCHMIDGALL gave his second immunized statement.

In December of 1990, Coram appeared before a grand jury to testify against SCHMIDGALL. (App. 10, 61). He attributed the information about which he testified to Steven Purvis, Tony Chambless, and others. (App. 11-12, 77-78). Coram testified about a drug smuggling venture that took place at a hunting camp near Sumter, Alabama in December of 1985. Coram attributed to all three witnesses testimony that SCHMIDGALL was present at the hunting camp as a radio operator during the smuggling operation. Only the testimony Coram attributed to Purvis and Chambless, however, contained specific details about SCHMIDGALL'S actions as a radio operator. For example, Coram attributed to Chambless and Purvis, but not to Wood, testimony that SCHMIDGALL was seen setting up an antenna and other equipment at a mobile home located at the hunting camp. (App. 14, 16, 78).

The grand jury indicted SCHMIDGALL on December 5, 1990. On February 26, 1991, SCHMIDGALL filed a motion to dismiss the indictment and for other relief based on *Kastigar v. United States*, 406 U.S. 441 (1972). He argued in the motion that he had received use and derivative use immunity for his January, 1988 and December, 1988 statements. He also argued that the government's case against him was based, at least in part, on evidence derived from those two statements. (App. 60-63).

The government conceded that SCHMIDGALL had received use and derivative use immunity for the January

1988 statement, but not that he had received immunity for the December 1988 statement. (App. 8, 24, 58). The government also did not concede that it had used either statement within the meaning of *Kastigar* and its progeny. The parties litigated those issues.

After holding *Kastigar* hearings on August 21, 1991 and August 27, 1991, the district court issued a Memorandum Opinion on January 13, 1992. In this Memorandum Opinion, the district court found that SCHMIDGALL had indeed received use and derivative use immunity for the December 1988 statement as well as for the January 1988 statement. (App. 59-60). The court concluded, however, that the government had not used any evidence derived from SCHMIDGALL'S statements with the possible exception of evidence obtained from Purvis and Chambless. (App. 65-66).

The district court rejected SCHMIDGALL'S argument that the prosecutor McLean and case agent Coram had to have used information derived from SCHMIDGALL'S statements in preparing the case against him because they had both been personally present when he gave his December 1988 statement and had been exposed in various ways to his January 1988 statement. The court recognized that Coram was present at the time SCHMIDGALL gave his December 1988 statement and hence was "definitely" aware of the contents of that statement. (App. 64). The court concluded, however, that "it is not enough to merely suggest that Coram was somehow tainted by his mere presence," thereby placing a burden on SCHMIDGALL to trace evidence to establish how Coram's knowledge of SCHMIDGALL'S statement tainted evidence Coram acquired later or tainted his grand jury testimony. (App. 64). The district court referred the case to a Magistrate Judge for the purpose of determining whether SCHMIDGALL'S statements had either led to the

Government's discovery of Purvis or Chambless or had tainted any evidence the Government obtained from Purvis or Chambless. (App. 65-66).

The Magistrate Judge found in the referral proceedings that the government's use of information obtained from Steve Purvis had violated Schmidgall's derivative use immunity but that the tainted information from Purvis had been harmless beyond a reasonable doubt. (App. 78, 80).

On March 13, 1992, the trial court issued a second Memorandum Opinion and order adopting the recommendations of the Magistrate Judge and denying SCHMIDGALL'S motion to dismiss. (App. 82-85). On May 8, 1992, SCHMIDGALL entered a conditional plea of guilty under Rule 11(a)(2), Federal Rules of Criminal Procedure, and thereby reserved his right to appeal the denial of his motions to dismiss and suppress. The trial court then sentenced SCHMIDGALL and entered a judgment of conviction. SCHMIDGALL timely appealed the judgment.

The United States Court of Appeals for the Eleventh Circuit took jurisdiction over the appeal under Title 28, United States Code, Section 1291, since SCHMIDGALL was appealing a final judgment of a district court. The court of appeals affirmed the ruling of the district court that the only tainted information the government used was the information obtained from Purvis. (App. 14, 15). The court also affirmed the ruling that the government's use of the tainted information from Purvis was harmless. (App. 16). The court expressly rejected SCHMIDGALL'S argument that the government had failed to prove nonuse of SCHMIDGALL'S statements because McLean and Coram had failed to segregate themselves from the

investigation after being exposed to SCHMIDGALL'S statements. (App. 11, 36).

ARGUMENT

I.

DID THE COURT OF APPEALS ERRONEOUSLY AFFIRM THE DENIAL OF SCHMIDGALL'S MOTION TO DISMISS THE INDICTMENT FOR A *KASTIGAR* VIOLATION WHERE BOTH THE PROSECUTOR AND THE CASE AGENT AGAINST SCHMIDGALL HAD BEEN EXPOSED TO SCHMIDGALL'S IMMUNIZED STATEMENTS BY VARIOUS MEANS BUT HAD FAILED TO SEGREGATE THEMSELVES OR THE IMMUNIZED STATEMENTS FROM THE INVESTIGATION OF THE CASE AGAINST SCHMIDGALL?

In *Kastigar v. United States*, 406 U.S. 441 (1972), this Court held that in order to compel a witness to make potentially self-incriminating statements under a grant of immunity, the government had to grant an immunity coextensive with the protection against self-incrimination in the Fifth Amendment to the Constitution. The minimum required level of immunity was that which would place the witness in the same position as one who invoked the privilege against self-incrimination and declined to speak. *Kastigar*, 406 U.S. at 453.

The minimum required level of immunity under *Kastigar* is use and derivative use immunity. If the government chooses to prosecute a witness despite a grant of use and derivative use immunity, it may use only evidence from "a legitimate source wholly independent of the compelled testimony." *Kastigar*, 406 U.S. at 460. In addition to being unable to use the immunized statement itself against the witness, the government also may not use

any evidence it has derived from the immunized statement. The government may use the immunized statement neither as an "investigatory lead" nor as a means of "focusing investigation on a witness as a result of his compelled disclosures." *Id.* As the court below acknowledged in the companion case to the case under review, the forbidden uses of a witness's immunized statement include its use to shape the questioning or testimony of other witnesses. *United States v. Schmidgall*, 25 F.3rd 1523, 1528 (11th Cir. 1994); *see United States v. North*, 910 F.2d 843, 856, 860 (D.C.Cir.), *petition for rehearing granted in part on other grounds*, 920 F.2d 940, 942 (1990), *cert. denied*, 500 U.S. 941 (1991) (use of the immunized testimony of a witness to refresh the recollection or focus the thoughts of other witnesses is a prohibited use under *Kastigar*).

The Court in *Kastigar* placed the burden of proof on the issue of the use of an immunized statement on the government. Once the existence of use and derivative use immunity is established or conceded, the government has "the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." *Kastigar*, 406 U.S. at 460.

Where a prosecutor or case agent has read, heard, or otherwise been exposed to immunized testimony, it is logical to infer that the immunized testimony will influence later investigation and case preparation. If the prosecutor and case agent participate in the investigation of a witness after being exposed to that witness's immunized testimony, they may use the testimony as a lead indicating what witnesses to question and what documents to obtain and review. They may also use the immunized testimony to assist in obtaining evidence from witnesses about whom they already know. *See North*, 910 F.2d at 863, 866 (in

determining whether a *Kastigar* violation has occurred, a court must consider not only whether the immunized testimony has assisted the government in identifying witnesses but also whether it has influenced the content of those witnesses' testimony). The investigators may, for example, use the immunized testimony to select new topics about which to question witnesses and to frame questions to ask witnesses. They may also use the immunized statement as a guide to interpreting the testimony or statements of other witnesses. Indeed, the prosecutor and investigators will view every piece of evidence they acquire after being exposed to the immunized statement through the lens of the statement. All these problems are compounded when the prosecutor and agents directly exposed to the immunized statement communicate with other government agents about it and thereby influence their investigations.

When, therefore, people exposed to an immunized statement remain involved in the investigatory process, it becomes quite difficult to determine which evidence has come from lines of investigation derived from the immunized statement and which has not. Prosecutors and investigators acting in good faith are still unlikely to have memories reliable enough to reconstruct all of their past states of knowledge and to sort out all of the subtle investigatory trails leading to each piece of evidence. If investigators or prosecutors exposed to an immunized statement remain involved in the investigation, there is a strong probability that they have in some manner used the statement in their gathering of evidence, or have influenced others who then indirectly used it. This is so even if the prosecutors and investigators in good faith can not recall having used the immunized statement. *See Hampton v. United States*, 775 F.2d 1479, 1491 and n.53 (11th Cir. 1985).

Since under *Kastigar* the burden of proof is on the government, the government must bear the risk that imperfect memories or records will render it unable to prove nonuse. As the court in *North* put it, "the government *always* bears the burden of proof and [a court] may not infer findings favorable to the government." *North*, 910 F.2d at 867 (emphasis in original).

In light of the practical difficulties of proving that prosecutors and investigators exposed to immunized testimony have not used it in some manner to derive evidence, some courts have concluded that the government can not meet its burden of proof under *Kastigar* when the prosecutor or government investigators have read or heard the contents of an immunized statement but then have failed to segregate themselves reliably from the later investigation of the immunized witness. In *Hampton*, for example, the United States Court of Appeals for the Eleventh Circuit stated that

> Unless the government relies solely upon evidence obtained prior to the immunized testimony, [citation omitted] the principles of *Kastigar* generally require (as a practical matter) a showing that prosecuting officials and their agents were aware of the immunity problem and followed reliable procedures for segregating the immunized testimony and its fruits from officials pursuing any subsequent investigations.

Hampton, 775 F.2d at 1490.

The United States Court of Appeals for the Fourth Circuit, in *United States v. Harris*, 973 F.2d 333 (4th Cir. 1992), while declining to adopt a per se rule requiring recusal of a prosecutor exposed to immunized testimony, did note that the continued participation of a prosecutor

exposed to immunized testimony made the government's burden of proof under *Kastigar* more difficult. *Harris*, 973 F.2d at 337. In affirming a district court finding that the government had not proved independent sources under *Kastigar*, the court commented that

> The usual precautions, not followed in this case, are for the government to insulate a prosecutor and/or investigator who is familiar with the immunized statement from subsequent prosecution of the compelled witness or to seal the incriminating documents.
>
> *Id.*

In *United States v. McDaniel*, 482 F.2d 305 (8th Cir. 1973), the United States Attorney who later prosecuted McDaniel in a federal case against him read transcripts of McDaniel's testimony before a state grand jury. The testimony McDaniel gave before the state grand jury pertained to matters relevant in the federal case as well. McDaniel had received automatic immunity under a state statute before giving his state grand jury testimony, but the prosecutor did not know about this grant of immunity when he read the grand jury transcript. He therefore took no precautions to insulate himself from the federal investigation of McDaniel or to segregate information derived from the grand jury transcript from the other sources of information in the case. The court concluded under those circumstances that the "testimony could not be wholly obliterated from the prosecutor's mind in his preparation and trial of the case." *McDaniel*, 482 F.2d at 312. The government's failure to segregate the immunized testimony and the persons exposed to it from the investigation made its burden of proving nonuse under *Kastigar* "insurmountable." *McDaniel*, 482 F.2d at 311.

The court in *McDaniel*, in addition to imposing a segregation requirement, took the position that the prohibited uses of immunized testimony included nonevidentiary uses such as planning trial strategy. *McDaniel*, 482 F.2d at 311. A court imposing a segregation requirement need not, however, also accept the principle that *Kastigar* prohibits nonevidentiary uses of immunized testimony. The court in *Hampton*, for example, imposed a segregation requirement even though it accepted the Eleventh Circuit position that *Kastigar* prohibited only uses of immunized testimony leading to the introduction of evidence. If those exposed to immunized testimony do not segregate themselves reliably from the investigation of the immunized witness, the government's burden of proving that the immunized testimony did not influence the gathering of evidence will be just as insurmountable as its burden of proving that the immunized testimony did not influence trial strategy in some other respect.

The segregation requirement of *McDaniel* and *Hampton* creates a bright line rule that benefits the government as much as it benefits immunized witnesses. Under *Kastigar*, the government must prove a negative proposition. It must prove that it did not use immunized testimony against the immunized witness. A definite prophylactic rule such as the segregation requirement of *McDaniel* makes it relatively easy for the government to meet this burden of proof. The government need merely assure itself that the agents listening to or reading immunized testimony do not participate in any later investigation of the immunized witness. *See, e.g., United States v. Jones*, 542 F.2d 186, 199-202 (4th Cir.), *cert. denied*, 426 U.S. 922 (1976) (district court correctly denied *Kastigar* motion where the state strike force before which Jones gave the immunized testimony effectively segregated itself from all later state and federal investigations of Jones).

In the absence of a segregation requirement, on the other hand, the government has no clear way of knowing whether it can meet its burden of proving nonuse. In the absence of a segregation requirement, agents exposed to immunized testimony may participate in the later investigation of the immunized witness. They will then somehow have to show that they did not use the immunized testimony despite knowing its contents. They will have to reconstruct all of their states of knowledge at various stages of the investigation. Due to the inevitable imperfections of human memory and the vagaries of any fact finding process, the government will remain uncertain until the conclusion of the *Kastigar* hearing whether its agents' reconstructions have successfully proved nonuse.

The absence of a segregation requirement or an equivalent bright line rule for determining compliance with *Kastigar* will therefore lead to uncertainty on the part of the government as to the procedures required to comply with *Kastigar*. Such uncertainty will tend to discourage the use of immunized witnesses, thus depriving the government of a useful and often essential law enforcement tool.

Potential immunized witnesses also need to know where they stand under *Kastigar*. Potential witnesses, before making intelligent decisions to give self-incriminating testimony, must know the exact scope of the protection they are receiving and the rights they are giving up. In the absence of a bright line rule such as the segregation requirement for determining when the government can prove nonuse, witnesses will not know exactly what they must establish in order to protect themselves while giving immunized testimony. They will not know exactly what the "immunity" they have been promised means. In the absence of a bright line rule imposing procedures for proving nonuse, there is a danger

that a court may impose a burden on the witness to trace evidence or otherwise to prove the government's use of the immunized testimony, even though *Kastigar* unequivocally places the burden of proof as to use on the government rather than the witness. Indeed, this appears to have happened in the case below, as the following discussion will show.

In the present case, the prosecutor Robert McLean was exposed to SCHMIDGALL'S immunized testimony in several ways. So was the case agent and grand jury witness against SCHMIDGALL, Thomas Coram. McLean and Coram were both personally present when SCHMIDGALL gave his second immunized statement on December 5, 1988. Coram and McLean therefore both knew what SCHMIDGALL had said during that statement. (App. 9, 61).

Coram and McLean were also exposed in various ways to SCHMIDGALL'S first immunized statement, which he gave on January 26, 1988. Between January 26, 1988 and December 5, 1988, Coram discussed the case with United States Coast Guard Lieutenant David Hume and with United States Customs Service agent Ronald Ingleby, who had both been present when SCHMIDGALL gave his first statement. (App. 10n.4, 61-62). McLean discussed the case with Ingleby. McLean also discussed the case with Customs agent Donald Schmidt, who had not attended the January 26, 1988 interview in person but who had reviewed notes of it. (App. 10n.4, 25, 31, 62). Coram also reviewed reports of various witness interviews Schmidt had conducted after reviewing the notes of SCHMIDGALL'S statement. (App. 10n.4). Thus, although McLean and Coram may not have known the ultimate source of the information about SCHMIDGALL they obtained from Hume, Ingleby, and Schmidt, they did receive information derived in various ways from

SCHMIDGALL'S January 26, 1988 statement in addition to the information they derived by being present at his December 5, 1988 statement.

McLean did not know there was a potential immunity problem until August of 1989, almost eight months after SCHMIDGALL gave his second statement. Only then, when he was called to testify at a *Kastigar* hearing concerning another case against SCHMIDGALL, did McLean learn of the need to segregate information derived from SCHMIDGALL'S statements from the other information in the case. Coram received no instructions from McLean to insulate himself until just before he went to the grand jury in December of 1990, almost two years after SCHMIDGALL'S second statement. (App. 10n.4, 61). Coram thus presumably took no precautions to segregate information derived from SCHMIDGALL'S statements until then.

McLean and Coram interviewed witnesses and reviewed documents pertaining to the case against SCHMIDGALL during the period between SCHMIDGALL'S first and second statements and after SCHMIDGALL'S second statement. During most of this period in the case of McLean and almost all of it in the case of Coram, they took no precautions to segregate information derived from SCHMIDGALL'S statements from other information in the case. The logical inference from these facts is that, perhaps without realizing it, Coram and McLean relied in part on information derived from SCHMIDGALL'S statements in preparing the case against SCHMIDGALL and presenting it to the grand jury. A reasonable court should conclude under these facts, as did the court in *McDaniel* under similar facts, that the government's burden of proving nonuse of SCHMIDGALL'S statements is insurmountable.

The Eleventh Circuit in the opinion below, however, refused to require investigators exposed to the immunized testimony to be segregated from later investigation of the immunized witness. *Schmidgall*, 25 F.3rd at 1537. (rejecting argument that any investigator exposed to immunized testimony was per se tainted). The court took a similar position in the companion opinion. *Schmidgall*, 25 F.3rd at 1531-32. The district court and Eleventh Circuit instead placed a burden on SCHMIDGALL to prove that the government's knowledge of SCHMIDGALL'S statements tainted some specific piece of evidence it had obtained. In rejecting the segregation requirement, the Eleventh Circuit adopted a position inconsistent both with its own earlier opinion in *Hampton* and with the view of the Eighth Circuit expressed in *McDaniel*. It also effectively placed a burden of proof on SCHMIDGALL and hence adopted a burden of proof rule inconsistent with *Kastigar*.

Conflict among the circuits concerning the existence of a segregation requirement will lead to uncertainty concerning the appropriate burden of proof in *Kastigar* proceedings. It will also lead to uncertainty regarding the procedures required to comply with *Kastigar*. This uncertainty will discourage government use of the immunity procedure and will impair the rights of immunized witnesses to protection coextensive with the rights they are giving up. The Court should therefore accept this case for certiorari review in order to resolve the intercircuit conflict concerning the segregation requirement and to clarify the appropriate burden of proof in *Kastigar* proceedings.

II.

DID THE TRIAL AND APPELLATE COURTS APPLY AN INCORRECT STANDARD FOR DETERMINING HARMLESS ERROR WHEN THEY CONCLUDED THAT THE INTRODUCTION BEFORE A GRAND JURY OF INFORMATION TAINTED BY A *KASTIGAR* VIOLATION COULD BE HARMLESS?

The district court concluded that when Coram gave the grand jury testimony attributed to Steven Purvis, he had impermissibly used Schmidgall's immunized statements within the meaning of *Kastigar*. It nevertheless concluded that the use of Purvis's tainted statements was harmless beyond a reasonable doubt and refused to dismiss. (App. 78, 80, 82-85). The court of appeals affirmed the district court finding that Purvis's testimony was tainted but harmless. (App. 16). In doing so the court of appeals applied a standard for determining the harmlessness of the error that was inconsistent with the harmless error jurisprudence of this Court. Application of the lower courts' standard for determining harmless error in the introduction of tainted evidence before a grand jury will likely impair both the preservation of the rights of the accused under *Kastigar* and the integrity of the grand jury process.

In *Arizona v. Fulminante*, 111 S.Ct. 1246 (1991), this Court ruled that certain "structural" errors in criminal proceedings can never be harmless. Structural errors affect the entire framework of the trial or proceeding rather than simply leading to the admission or exclusion of particular evidence or some other particular error in the trial. *Fulminante*, 111 S.Ct. at 1265 (Opinion of Rehnquist, C.J.). *Cf. Chapman v. California*, 386 U.S. 18 (1967) (propounding "harmless beyond a reasonable doubt" standard applicable to most constitutional errors).

In *Sullivan v. Louisiana*, 113 S.Ct. 2078 (1993), the Court held that a constitutionally deficient reasonable doubt instruction is a structural error requiring automatic reversal without any harmless error analysis. *Sullivan*, 113 S.Ct. at 2082-83. A deficient reasonable doubt instruction does not merely affect a piece of evidence but instead distorts the way in which the jury views all of the evidence in the case. Its effects are "necessarily unquantifiable and indeterminate," making any harmless error analysis futile. *Id.*

Application of the "harmless beyond a reasonable doubt" standard to the introduction of tainted evidence before a grand jury is inconsistent with *Fulminante* and *Sullivan*. In the grand jury process, there is no adversary procedure. There is no system of cross examination or opposing argument to encourage jurors to evaluate the credibility of witnesses or to place pieces of evidence in their proper context. Each piece of evidence is presented as the equal of every other piece of evidence. It therefore becomes extremely difficult to determine what pieces of evidence or combination of pieces of evidence have persuaded the grand jurors to indict. As far as anyone can determine, once the grand jurors have been exposed to tainted testimony, they view every other piece of evidence introduced before them through the perspective created by the tainted testimony, so that it becomes impossible to say that the grand jurors would have indicted without the tainted testimony. The precise effect of tainted testimony on a grand jury is therefore unquantifiable, just as the effect of the improper reasonable doubt instruction in *Sullivan* was unquantifiable.

In addition, any attempt to isolate the effect of a particular piece of evidence on the grand jurors' decision to indict necessarily requires an examination of the grand jurors' thought processes. Such an examination will lead to

second guessing of the grand jurors' deliberative process and hence will impair the policy of grand jury secrecy. *Cf. United States v. Hinton*, 543 F.2d 1002, 1009-10 (2nd Cir. 1976) (adopting rule that a grand jury before whom an immunized witness testifies cannot indict that witness; adopting the rule in order to eliminate the need for an examination of the grand jurors' deliberative process and the consequent threat to grand jury secrecy).

In the present case, the district court and court of appeals concluded that the use of Purvis's tainted testimony was harmless beyond a reasonable doubt because it merely duplicated other, supposedly untainted testimony placing SCHMIDGALL at the hunting camp. (App. 14-16, 78, 80, 82-85). One cannot conclude beyond a reasonable doubt that Purvis's testimony had such a limited effect, however. Coram testified to the grand jury that two witnesses, Chambless and Purvis, saw SCHMIDGALL setting up radio equipment at the hunting camp. Without the tainted testimony of Purvis, there was only one uncorroborated witness, Chambless, who saw and could describe in detail SCHMIDGALL'S activities at the hunting camp. (App. 14, 78). One cannot say beyond a reasonable doubt that the reference to two seemingly independent witnesses who saw SCHMIDGALL setting up equipment at the hunting camp, rather than just to one uncorroborated witness, did not influence the grand jury's decision to indict.

More importantly, the court of appeals applied a standard inconsistent with the precedents of this Court when it analyzed whether the *Kastigar* violation in introducing Purvis's tainted testimony before the grand jury was harmless. Any attempt to isolate the effect of Purvis's testimony on the grand jurors would require an analysis of the grand jurors' thought processes such as that contained in the opinion below or in the preceding

paragraph. In order to avoid this invasion of the grand jury's deliberative process, the introduction of tainted evidence before a grand jury should be treated as a structural error inherently warping the entire grand jury process. The court below deviated from the principles of *Fulminante* and *Sullivan* when it treated the introduction of tainted evidence before the grand jury as a nonstructural error which could be evaluated under the ordinary rules for evaluating the prejudicial effect of an error.

CONCLUSION

In light of the foregoing arguments, the Court should accept this case for certiorari review and should reverse the Eleventh Circuit's affirmance of SCHMIDGALL'S conviction and sentence.

Respectfully submitted,

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Supreme Court, U.S.
FILED

(2) 941101 DEC 20 1994

OFFICE OF THE CLERK

CASE NO.

in the Supreme Court of the United States

October Term, 1994

CHRISTIAN W. SCHMIDGALL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES of America,
Plaintiff-Appellee,

v.

Christian SCHMIDGALL,
Defendant-Appellant.

No. 92-6449.

United States Court of Appeals,
Eleventh Circuit.

July 14, 1994.

The United States District Court for the Northern District of Alabama, No. CR90-PT-261-S, Robert B. Propst, J., rejected defendant's argument that any investigator exposed to defendant's immunized information regarding drug smuggling venture was per se tainted, and he appealed. The Court of Appeals, Anderson, Circuit Judge, held that: (1) venture participant's statement used before grand jury was tainted by defendant's immunized testimony, and (2) although participant's statement was tainted, use of statement before grand jury was harmless, such that indictment would stand.

Affirmed.

1. Criminal Law —42

Conclusory denials regarding use of defendant's immunized testimony alone were not enough to carry government's burden under *Kastigar*. U.S.C.A. Const.Amend. 5.

2. Criminal Law —393(1)

Any investigator exposed to immunized information was not per se tainted for purposes of defendant's claim

that his Fifth Amendment right against self-incrimination was violated because law enforcement authorities used his immunized testimony in obtaining indictment against him. U.S.C.A. Const.Amend. 5.

3. Criminal Law —42

Proof of reliance on information gathered prior to the taking of immunized testimony generally is sufficient for government to carry its burden under *Kastigar* of proving that evidence proposed to be used is derived from legitimate source independent of immunized testimony. U.S.C.A. Const.Amend. 5.

4. Criminal Law —42

Defendant's immunized testimony regarding his participation in drug smuggling venture did not provide information that allowed law enforcement authorities to elicit description from venture's organizer of another participant in venture who, in turn, identified defendant as venture's radio operator; defendant's testimony never mentioned participant, evidence supported finding that defendant did not know participant as the two had only a brief meeting and no person who was present at defendant's interview, including defendant himself, asserted that defendant identified participant. U.S.C.A. Const.Amend. 5.

5. Criminal Law —393(1)

Information elicited from participant in drug smuggling venture and used before grand jury was not tainted by defendant's immunized testimony so as to violate defendant's Fifth Amendment right against self-incrimination; defendant's participation in smuggling venture was well-documented before any immunized

testimony was taken and participant added only minor points and these additional details added little to information known to prosecution before any immunized statements were taken. U.S.C.A. Const.Amend. 5.

6. Criminal Law —42

Government is not required to negate every abstract possibility of taint from defendant's immunized testimony. U.S.C.A. Const.Amend. 5.

7. Criminal Law —42

Because burden of disapproving taint from defendant's immunized testimony regarding drug smuggling venture was allocated to the government, lack of evidence as to whether government used defendant's immunized testimony to shape interrogation of venture participant whose statements were used before grand jury led to finding that participant's statement was tainted within meaning of *Kastigar*. U.S.C.A. Const.Amend. 5.

8. Indictment and Information —144.1(3)

Dismissal of indictment is not required when use of immunized testimony was harmless beyond reasonable doubt.

9. Indictment and Information —144.1(3)

Although drug smuggling participant's statement used before grand jury was tainted by defendant's immunized testimony, grand jury indictment would stand because participant's identification of defendant as being present at hunting camp where operation was conducted was harmless in view of the overwhelming untainted evidence of that same fact and the other details provided by

participant were insignificant and harmless. U.S.C.A. Const.Amend. 5.

Philip M. Gerson, Miami, FL, for appellant.

Robert J. McLean, Jack W. Selden, John E. Ott, Asst. U.S. Atty., Dept. of Justice, U.S. Attorney's Office, Birmingham, AL, for appellee.

Appeal from the United States District Court for the Northern District of Alabama.

Before KRAVITCH, ANDERSON and EDMONDSON, Circuit Judges.

ANDERSON, Circuit Judge:

This case involves another claim by Defendant-Appellant Christian Schmidgall that his Fifth Amendment right against self-incrimination was violated because law enforcement authorities used his immunized testimony in obtaining an indictment against him. This claim relates to an indictment in the Northern District of Alabama. Many of the relevant facts and much of the applicable law are discussed in an opinion, issued simultaneously with this opinion, regarding Schmidgall's similar challenge to an indictment returned in the Middle District of Florida. *United States v. Schmidgall*, 25 F.3d 1523 (11th Cir.1994).

The indictment at issue here was based on Schmidgall's participation in a venture that resulted in the importation of 512 kilograms of cocaine into Sumter county, Alabama in December of 1985. The venture was organized by William Wood. Schmidgall served as a radio specialist: monitoring law enforcement transmissions, maintaining contact with the small airplane carrying the

cocaine from Colombia, and communicating with the ground crew at a rural airstrip where the plane was to land. He operated from a mobile home on a hunting camp owned by some of the co-conspirators. The cocaine was flown to a landing strip on another hunting camp,[1] then transported to the camp at which Schmidgall was located. The cocaine was then taken by automobile to Florida, where it was distributed.[2]

THE SEQUENCE OF INTERVIEWS

The first account of Schmidgall's participation in this venture came from a November 11, 1987 interview with David Carlson, one of William Wood's pilots in smuggling ventures. Carlson told Customs Agent Donald Schmidt[3] that he flew a person he knew only as "Chris" from Florida to Alabama. Carlson identified Chris as a former commercial airline pilot and a counter-surveillance specialist. Chris loaded a large piece of equipment onto the plane, which he told Carlson was a spectrum analyzer that aided in monitoring law enforcement frequencies.

Further details of the Alabama operation were provided by Wood himself during his initial interview at a federal penitentiary in Kentucky on November 19, 1987. Wood was the coordinator of the importation, as well as serving as one of the pilots who flew the cocaine from Colombia to Alabama. He stated that Schmidgall (identified by his full name) "ran radios" for this operation

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[1]The owner of the hunting camp with the airstrip had no knowledge that his property was being used in a drug-smuggling operation.

[2]The smugglers brought the drugs into the country via Alabama because of increased law enforcement presence in Florida.

[3]Schmidt worked out of the Middle District of Florida and was the primary investigator in the early stages of the Wood case. He conducted all the relevant interviews before the January 26, 1988 Schmidgall interview.

by using spectrum analyzers to monitor law enforcement frequencies.

The next statement came from Howard Carrell, Wood's brother-in-law and another conspirator, on December 29, 1987. Carrell identified Schmidgall as the radio operator for marijuana airdrops in Florida; he also gave details of the Alabama importation, but did not identify Schmidgall as a participant in that venture.

Wood was debriefed again on January 12, 1988, providing yet more details about the Alabama venture. He related that he and his copilot were in constant radio contact with Schmidgall, who was at the hunting camp in Sumter County.

On January 26, 1988, defendant Schmidgall was interviewed in Miami by several law enforcement agents from the Southern District of Florida (not including Agent Schmidt). Although no formal report of this interview was made, the record includes five pages of handwritten notes apparently made by an Internal Revenue agent present at the debriefing. The government concedes that Schmidgall was granted use and derivative use immunity for this interview.

As the investigation into the Wood conspiracy progressed, information was gathered from dozens of sources. An increasing number of jurisdictions became involved. We will briefly describe those events relevant to this appeal.

Beginning in April 1988, Wood was extensively debriefed by many government agents pursuant to a plea agreement. The interviewers included Agent Schmidt, Customs Agent Ronald Ingleby from the Southern District of Florida, and Customs Agent Mike Holt from the

Northern District of Alabama. Ingleby had been present at the January Schmidgall interview. Schmidt had been given a copy of the notes of that interview prior to the April Wood interviews. Three reports were produced from these extensive interviews of Wood: one from Schmidt, one from Ingleby, and a third produced by Customs Agent Thomas Coram. The Coram report was the result of a debriefing of Agent Holt in September of 1988; prior to that time, Coram had taken over the investigation in the Northern District of Alabama upon Holt's promotion.

On October 20, 1988, Agent Coram interviewed Tony Chambless, an Alabamian who was involved in the December 1985 importation. Chambless had initially been identified (by first name only) by Wood in the April interviews. The Coram report stated that Wood identified "Tony . . . from Demopolis" as a white male in his mid-30s, five feet ten inches tall, weighing 180 pounds, with dark hair and a beard, who worked for a paper company in the Demopolis area. This detailed description led to Alabama authorities identifying Chambless, who eventually entered a plea and gave a statement. Chambless did not known Schmidgall, but was able to identify him through a photo lineup as the radio operator at the hunting camp during the December 1985 importation. He gave authorities a few details about the setup of Schmidgall's equipment.

Agent Coram and others conducted an interview of Schmidgall on December 5, 1988. The district court in this case found that Schmidgall was granted use and derivative use immunity for statements made at this interview; the government does not challenge that finding. Schmidgall had traveled to Birmingham pursuant to a subpoena. He gave details regarding the December 1985 venture, but apparently provided nothing not revealed in his January 1988 statement. Schmidgall was scheduled to return the

following day, but failed to show up after a dispute over immunity arose.

On August 23, 1989, Agent Coram interviewed Steve Purvis, who had been involved in the Alabama smuggling. Purvis had first been identified by Wood on January 12, 1988. In the interview, Purvis confirmed previously revealed aspects of Schmidgall's participation and added a few details, such as the use of a stripped copper wire strung in a tree as an antenna.

[1] Agent Coram testified before the grand jury on December 4, 1990, relating details of the Alabama venture including Schmidgall's participation.[4] The grand jury returned the indictment that is now challenged by Schmidgall.

DISCUSSION

The district court held a *Kastigar*[5] hearing to determine whether Schmidgall had been granted

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[4]Coram, the sole grand jury witness against the defandant, had participated in the December 5, 1988 interview of Schmidgall and thus plainly had been exposed to immunized testimony. In addition, Coram had reviewed certain investigatory reports—such as those of Agents Ingleby and Schmidt—that might have been indirectly tainted by Schmidgall's January 26 interview. Coram was unaware of any potential *Kastigar* problem until immediately before his grand jury testimony, when Assistant United States Attorney Joe McLean—who questioned Coram before the grand jury and also had been exposed to immunized testimony—told Coram not to divulge any information learned from Schmidgall. The conclusory denials of Coram and McLean regarding the use of immunized testimony alone are not enough to carry the government's burden under *Kastigar*. *United States v. Hampton*, 775 F.2d 1479, 1489 (11th Cir.1985). However, as we explain *infra*, our focus must be on the evidence actually presented to the grand jury.

[5]*Kastigar v. United States*, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972). A detailed explanation of *Kastigar* is included in our opinion addressing Schmidgall's Florida indictment. *See* 25 F.3d at 1528.

immunity during the December 5, 1988 interview and, if so, whether evidence derived from that interview was used to obtain his indictment. The court also considered Schmidgall's allegation that information obtained during his immunized January 26, 1988 interview in Florida had been used against him. As we have noted, the court concluded that both interviews were given under use and derivative use immunity.

[2] The court held that the relevant issue "is whether the government has met its burden of showing that *its evidence* presented to the grand jury *is not tained*." *United States v. Schmidgall*, No. CR90-PT-261-S (N.D.Ala. Jan. 13, 1992), at 4 (emphasis in original). As we have explained in the companion to this case, the focus on the evidence actually used by the government in obtaining the indictment is a correct application of *Kastigar* and the cases interpreting its principles in this Circuit. We therefore affirm the district court in rejecting Schmidgall's argument that any investigator exposed to immunized information is *per se* tained.

[3] After examining Agent Coram's grand jury testimony, the district court found that the majority of the information presented was known to investigators before Schmidgall gave his first immunized statement in January 1988. Proof of reliance on information gathered prior to the taking of immunized testimony generally is sufficient for the government to carry its burden under *Kastigar*. *See United States v. Byrd*, 765 F.2d 1524, 1529 (11th Cir.1985). Upon our own review of Coram's grand jury testimony, we agree with the district court. Most of the information presented was first revealed in interviews with Carlson, Carrell, and Wood (in the two interviews of Wood prior to January 26, 1988). With regard to this evidence, the government has proven that there is no taint.

Before the grand jury, Coram also referred to Tony Chambless and Steve Purvis. The district court found this more problematical because Chambless was not interviewed until October 20, 1988 (after the first immunized Schmidgall interview) and Purvis was not interviewed until August 23, 1989 (after the second Schmidgall interview). In addition, Chambless and Purvis were interviewed by Agent Coram, who had access to materials that were possibly tained by the first Schmidgall interview and who conducted the second Schmidgall interview himself. The district court correctly observed that *Kastigar* prohibits the use of immunized testimony as an "investigatory lead," *Kastigar*, 406 U.S. at 460, 92 S.Ct. at 1664-65; therefore, if Schmidgall first identified Chambless or Purvis, or if information from Schmidgall was used to shape the interrogation of either witness, Coram's grand jury testimony would be tainted. The district court referred consideration of the evidence regarding Chambless and Purvis to a magistrate judge. We first will discuss and review the findings relating to Chambless, then turn to Purvis.

A. Chambless

[4] The magistrate judge conducted a thorough review of the voluminous record in this case.[6] He determined that the initial lead to the identity of Chambless was provided by Wood during his extensive debriefings in April 1988. We agree with the magistrate judge's finding. Wood first identified Chambless by first name only in April 1988, but also provided a detailed description of him, including physical attributes, area of residence, and type of employment. Because this interview came after the first Schmidgall interview, the magistrate

[6]The record—which we have also given a complete review—includes lengthy transcripts of *Kastigar* hearings from several districts, as well as many investigative reports and other mateirals.

judge considered whether anything Schmidgall said was used to prompt Wood's identification of Chambless. The notes of the January 26, 1988 Schmidgall interview never mention Chambless. As the magistrate judge noted, the evidence supports the findings that Schmidgall did not know Chambless; the two had only a brief encounter at the hunting camp in December 1985. No person who was present at the Schmidgall interview—including Schmidgall himself—asserted that Schmidgall identified Chambless.[7] The lack of reference to Chambless in the notes of the Schmidgall interview is additional evidence rebutting any inference that Schmidgall provided information that allowed authorities to elicit the description of Chambless given by Wood. We agree with the magistrate judge that the government proved it had wholly independent sources leading to the identification of Chambless.

[5, 6] The magistrate judge then considered whether any of the statements obtained from Chambless and used before the grand jury were tainted. He found, and the district court agreed, that the Chambless interview was not tainted. Upon our examination, we conclude that the government has proven that the use of information elicited from Chambless before the grand jury did not violate

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[7]Present at both Schmidgall interviews was Coast Guard Lt. David Hume, to whom Schmidgall had been providing information on unrelated smuggling operations. Hume testified that he made notes at both interviews; however, these notes were seized by the Coast Guard and classified as national security information. At oral argument, Schmidgall's counsel argued that Hume's notes show that Schmidgall identified both Purvis and Chambless in his January interview. Counsel claimed to have moved the district court to order production of the Hume notes, and argued that we should direct the district court to rule on this motion. This argument was not raised in Schmidgall's brief, so we decline to address it. *American Steel Building Co. v. Davidson & Richardson Const. Co.*, 847 F.2d 1519, 1522 n. 4 (11th Cir.1988). In any event, identification of Purvis would be irrelevant because he was earlier identified by Wood.

Schmidgall's Fifth Amendment right against self-incrimination. As we have pointed out, Schmidgall's participation in the smuggling venture was well documented before any immunized testimony was taken. Chambless added only minor points: that Schmidgall[8] was in a back bedroom of the mobile home at the hunting camp hooking up radios and scanners and talking on the radio, and that a scanner was placed on a television in the den. These additional details add little to the information known to the prosecution before any immunized statements were taken. It is true, however, that Chambless actually saw Schmidgall at the site, although there was ample other evidence that he was there. We need not decide whether Chambless added so little to the evidentiary picture as to be harmless, because we conclude in any event that Chambless' identification of Schmidgall was not tainted. We noted above that nothing in the Schmidgall notes led the investigators to Chambless. Furthermore, none of the few details that Chambless added to the investigative knowledge are present in the notes of the January Schmidgall interview, suggesting that none of the information elicited from Schmidgall was used directly or indirectly to influence the statement of Chambless. The government is not required to negate every abstract possibility of taint. *United States v. Byrd*, 765 F.2d 1524, 1529 (11th Cir.1985). The prosecution has carried its burden of proving an absence of taint by a preponderance of the evidence. *Id.*

B. Purvis

The magistrate judge found that, like the identification of Chambless, the identification of Purvis was first provided by Wood in April 1988. However, we point out

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[8]We again note that Chambless did not know Schmidgall; he merely told authorities what the radio operator did, then identified Schmidgall as the operator from a photo array.

that Purvis in fact was first identified as a participant in the Alabama smuggling by Wood on January 12, 1988—*before* the first immunized Schmidgall interview. Therefore the identification of Purvis clearly was free of any taint.

[7] As the magistrate judge noted, analysis of the Purvis statement for potential taint presents a more difficult problem. Purvis was interviewed *after* Schmidgall's December 1988 Birmingham statement. In addition, the Purvis interview was conducted by Agent Coram, who had also led the December Schmidgall interview. The actual interrogation of Purvis was not recorded, so we are unable to compare the information elicited from Schmidgall with the questions posed to Purvis to determine if the former shaped the latter. The magistrate judge therefore compared Coram's reports of the Schmidgall and Purvis interviews, finding a great deal of similarity between them. Details such as the use of a partially stripped copper wire thrown into a tree as an antenna appear in both reports. Of course, the similarity simply may be due to the fact that Schmidgall and Purvis were independently recalling the actual facts of the venture. However, the government has the burden of proving that it did not impermissibly use Schmidgall's statement. The magistrate judge noted that the record simply contains no direct evidence regarding whether the government used Schmidgall's testimony to shape the interrogation of Purvis. Because the burden of disproving taint is allocated to the government, the lack of evidence would lead to a finding that the Purvis statement was tainted within the meaning of *Kastigar*.

[8, 9] The inquiry does not end at this point, however. Dismissal of the indictment is not required when use of the immunized testimony was harmless beyond a reasonable doubt. *United States v. Byrd*, 765 F.2d 1524, 1529 n. 8 (11th Cir.1985). The magistrate judge found that

Purvis' testimony was used only to establish that Schmidgall was at the hunting camp during the smuggling venture, a fact that was also established by the independent, untainted testimony of several witnesses: Carlson, Wood (in his two interviews preceding the first immunized Schmidgall statement) and Chambless. We agree that Purvis' identification of Schmidgall as being present at the hunting camp is harmless beyond a reasonable doubt, in view of the overwhelming untainted evidence of that same fact. Moreover, we agree with the magistrate judge that the other details (*e.g.* stripped copper wire) provided by Purvis were insignificant and harmless beyond a reasonable doubt. Therefore, the indictment may stand.

CONCLUSION

In sum, we find that the bulk of the evidence presented to the grand jury was known to investigators prior to the taking of Schmidgall's first immunized statement on January 26, 1988. Of the evidence offered to the grand jury that was gathered after that date, we find that the information taken from the statement of Tony Chambless was not tainted. The government has failed to prove that the statement of Steve Purvis was not tainted; however, the limited use of this information before the grand jury was harmless beyond a reasonable doubt.

AFFIRMED.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Christian SCHMIDGALL,
Defendant-Appellant.

No. 91-4161.

United States Court of Appeals,
Eleventh Circuit.

July 14, 1994.

Defendant was convicted in the United States District Court for the Middle District of Florida, No. 89-179-CR-T-10(A), Wm. Terrell Hodges, J., pursuant to conditional plea of guilty to two counts of conspiring to violate federal law by unlawfully importing cocaine, and he was sentenced to two concurrent six-year terms. Defendant appealed. The Court of Appeals, Anderson, Circuit Judge, held that: (1) government failed to meet burden of proving by preponderance of evidence that none of defendant's immunized testimony was used in obtaining indictment against him, and (2) district court did not make prohibited "groundless inference" when court based its sentencing decision on undisputed fact that sentence would be parolable, along with assumption that parole might in fact be granted.

Vacated and remanded.

Kravitch, Circuit Judge, filed concurring and dissenting opinion.

1. Criminal Law —42

When presented with *Kastigar* challenge, court's task is to determine whether any of evidence used against

defendant was in any way derived from his compelled immunized testimony; once defendant shows that he has testified under immunity, prosecution has burden of showing that its evidence is not tainted, which is done by establishing existence of independent, legitimate source for disputed evidence. U.S.C.A. Const.Amend. 5.

2. Criminal Law —393(1)

Fifth Amendment standard applies to informal grants of immunity. U.S.C.A. Const.Amend. 5.

3. Criminal Law —42

To establish source of evidence "wholly independent" from defendant's compelled immunized testimony, government must demonstrate that each step of investigative chain through which evidence was obtained is untainted, which includes affirmative showing that none of evidence presented to grand jury was derived directly or indirectly from immunized testimony. U.S.C.A. Const.Amend. 5.

See publication Words and Phrases for other judicial constructions and definitions.

4. Criminal Law —393(1)

Protection against self-incrimination is violated whenever prosecution presents witness' testimony that has been shaped, directly or indirectly, by immunized testimony, regardless of how or by whom witness was exposed to that testimony; prohibited indirect derivation includes using immunized testimony to help shape questioning of another witness. U.S.C.A. Const.Amend. 5.

5. Criminal Law —42

Government agent's denials that he made use of immunized testimony, standing alone, are generally insufficient to meet government's burden of establishing "wholly independent" source, even if such denials are made in good faith. U.S.C.A. Const.Amend. 5.

6. Criminal Law —42

Government is required to prove that evidence relied upon has not been tainted by compelled immunized testimony only by preponderance of evidence; negation of all abstract possibility of taint is not necessary. U.S.C.A. Const.Amend. 5.

7. Criminal Law —1169.1(8)

Even if immunized testimony was in fact used, indictment or conviction may be upheld on finding that use of such tainted evidence was harmless beyond reasonable doubt. U.S.C.A. Const.Amend. 5.

8. Criminal Law —42

Government failed to prove that Customs special agent did not use notes of immunized interview with defendant to shape his questioning of defendant's coconspirator or other witnesses, or prove that agent did not obtain and use tainted information from other agents, as required to show that agent's grand jury testimony was not tainted within meaning of *Kastigar,* particularly given confusion as to time period during which another district was responsible for prosecuting matter. U.S.C.A. Const.Amend. 5.

9. Criminal Law —42

Use of immunized testimony to corroborate independently obtained information does not violate *Kastigar*. U.S.C.A. Const.Amend. 5.

10. Criminal Law —42

Government agent's testimony can be sufficient to establish that immunized testimony was not used against defendant when such testimony is adequately supported, i.e., consistent with facts and circumstances of case. U.S.C.A. Const.Amend. 5.

11. Criminal Law —42

Failure of agents either to rely solely upon information obtained before immunized statement was given or to adopt procedures to ensure that there is no use of immunized statement or evidence derived therefrom does not establish per se *Kastigar* violation. U.S.C.A. Const.Amend. 1.

12. Criminal Law —986.2(1)

Sentencing court did not make prohibited "groundless inference" when court based its sentencing decision on undisputed fact that sentence would be parolable, along with assumption that parole might in fact be granted.

See publication Words and Phrases for other judicial constructions and definitions.

13. Criminal Law —1208.3(2)

Sentence within statutory limits will not be questioned on appeal absent showing of arbitrary or capricious action amounting to gross abuse of discretion.

14. Criminal Law —986.2(1)

Defendant may not be sentenced based on groundless inferences.

Philip M. Gerson, Miami, FL, for appellant.

Gary Montilla, Tampa, FL, for appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before KRAVITCH, ANDERSON and EDMONDSON, Circuit Judges.

ANDERSON, Circuit Judge:

Defendant-Appellant Christian Schmidgall was indicted in the Middle District of Florida for conspiring to violate federal law by unlawfully importing cocaine through Rock Sound, Bahamas on Christmas Eve, 1985 in violation of various provisions of Title 21 of the United States Code. He moved to dismiss the indictment, claiming an improper use of his immunized testimony in violation of his Fifth Amendment right against self-incrimination. *See Kastigar v. United States,* 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972). After a three-day hearing before a magistrate, Schmidgall's motion was denied. He then entered a conditional plea of guilty to two counts pursuant

to Fed.R.Crim.P. 11(a)(2). Schmidgall was sentenced to two six-year terms, to run concurrently.

Schmidgall now appeals his conviction and his sentence. He argues that the district court erred in determining that his indictment was obtained without any use of his immunized testimony. In addition, he argues that the district court erred in considering the availability of parole when imposing his sentence. We will address these issues in turn.

FIFTH AMENDMENT *KASTIGAR* CLAIM

I. Factual Background

Law enforcement authorities throughout the Southeast United States conducted a widespread investigation into drug importation activities coordinated by William Wood.[1] The investigation of Wood's activities in the Middle District of Florida was dubbed "Operation Timber" and initially was spearheaded by Customs Special Agents Donald Schmidt and Daniel Dunn. The investigation began in January 1987, after a small jet of Wood's was seized and became the subject of a civil forfeiture proceeding. After the forfeiture was concluded, Agents Schmidt and Dunn worked together in Operation Timber until the spring of 1988, when Dunn was promoted to a supervisory position and Schmidt became the sole case agent.

One of Wood's co-conspirators was Defendant-Appellant Christian Schmidgall, a former commercial airline captain whose specialty was "running radios": monitoring law-enforcement frequencies and maintaining

[1]The account of the investigation is drawn from the transcripts of the *Kastigar* hearing before U.S. Magistrate Charles Wilson in Tampa, Florida on February 5, 6, and 13, 1991.

contact with pilots flying illegal drugs into the country. As early as April 1987, investigators had evidence linking Schmidgall with Wood, in the form of reports indicating that Schmidgall, Wood, and others had flown from the Bahamas into the United States in late 1985. On November 11, 1987, Agent Schmidt and others interviewed David Carlson, another player in the Wood conspiracy. He identified Schmidgall (by first name only) as a participant in a venture that smuggled cocaine into Alabama in December of 1985;[2] however, Carlson gave no information regarding the transaction involved in this case.

Eight days later, on November 19, 1987, Schmidt, Dunn, and others interviewed William Wood, who was incarcerated in federal prison in Ashland, Kentucky. In this interview, Wood identified Schmidgall as a "radio runner" in general and gave a few details about the Alabama importation. Subsequent to this interview with Wood, Schmidt compiled additional evidence regarding Schmidgall, including more reports of flights entering the country from the Bahamas. These reports indicated that Schmidgall had flown with a person named Jeffrey Hutchinson. Other investigation included interviews with Wood associates who confirmed Schmidgall's role in the Alabama importation; none of these persons gave information regarding the cocaine importation through Rock Sound, Bahamas on Christmas Eve, 1985, the transaction that is the basis of Schmidgall's conviction in this case.

Wood was interviewed for a second time on January 12, 1988 in the Sarasota (Florida) County Jail. Wood was brought to Florida pursuant to a pending agreement in which Wood would become a government

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[2]The Alabama importation is the subject of another *Kastigar* appeal by Schmidgall. *See United States v. Schmidgall*, 25 F.3d 1533 (11th Cir. 1994), issued simultaneously with the instant case.

witness, providing detailed information about the importation of thousands of kilograms of illegal drugs. In the January interview, Wood provided a few details of the Rock Sound venture, including the involvement of Schmidgall, the amount of cocaine involved, and the fact that various problems beset the venture resulting in only partial success.

On January 21, 1988, Agents Dunn and Schmidt—accompanied by Ronald Ingleby and C.C. Savage, also Customs agents—visited Schmidgall's home in Lighthouse Point, Florida. The purpose of the visit was to convince Schmidgall to cooperate in the government's investigation. No substantive information was obtained at this time, and Schmidgall makes no Fifth Amendment claim regarding this transaction.

Before January 26, 1988, the government had general knowledge of the Rock Sound venture and Schmidgall's involvement, but lacked specific details. Schmidgall submitted to an interview on January 26, 1988 in the office of William Shockley, Assistant United States Attorney for the Southern District of Florida. Also present were Customs Agent Ingleby, Internal Revenue Service Agent Rodney Clark, and United States Coast Guard Lt. David Hume. Neither Schmidt nor Dunn participated in this interview. The government has stipulated that Schmidgall was granted "use" and "derivative use" immunity, but not "transactional" immunity. In other words, the government agreed that nothing Schmidgall said could be used in any manner that would incriminate Schmidgall; however, he was not guaranteed that he would not be prosecuted for his participation in the smuggling conspiracy. During this interview, Schmidgall recounted details of the Rock Sound venture that previously had not been disclosed to the government.

Agent Schmidt was in the Miami area during the first week of February 1988. During that trip, Schmidt visited Agent Ingleby's office. Ingleby gave Schmidt a copy of the handwritten notes IRS Agent Clark had made during the immunized January 26 Schmidgall interview.[3] At the time, Schmidt had no idea that the information in the notes was protected by immunity. He testified that he "briefly perused" the notes and then filed them away. Schmidt also testified that he never again read the notes, because sometime in the early summer of 1988 it was decided that the Rock Sound importation would be prosecuted in the Southern District of Florida.

Before that decision was made, however, Schmidt participated in an extensive debriefing of William Wood. Wood had reached a tentative plea agreement, following which he was debriefed in great detail for about 60 hours from April 22-29, 1988. Schmidt was the primary questioner. From this series of interviews, Schmidt produced a 31-page report summarizing Wood's account of many different smuggling ventures. Wood described the Rock Sound project in greater detail than he had in his January 12 statement; included were facts similar to information revealed by Schmidgall in his immunized January, 1988 interview in the office of the U.S. Attorney for the Southern District of Florida, which information was also included in the interview notes given to Schmidt.

Following the detailed Wood interviews, Schmidt continued to investigate the smuggling ring, including the Rock Sound venture.[4] In May 1988, he requested and

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[3]It is not entirely clear that Clark is the person who made the notes; however, the identity of the note-taker is not germane to the resolution of this case.

[4]Between the early summer of 1988 (when most of the prosecution was shifted to the Southern District of Florida) and the fall of 1989

(Footnote continued on next page)

received more detailed accounts of flights between the Bahamas and Florida made by Wood, Schmidgall, and others. In September of that year, Schmidt received a report indicating that an aircraft associated with Schmidgall had been abandoned at an airfield in Rock Sound on Christmas Eve, 1985. From July 26 through September 6, 1988, Schmidt had a series of interviews with William Davis, the pilot of the plane that flew the cocaine from Columbia to Rock Sound. Davis recounted details including Schmidgall's participation in the venture.

Schmidt also had ongoing contact with investigators from other districts who were working on the Wood conspiracy. Agent Ingleby, who had been present at the January 1988 Schmidgall interview, continued to exchange information with Schmidt; Ingleby had conducted extensive debriefings of Wood after Schmidt's April 1988 Wood interviews. Ingleby placed his summary of the Wood debriefings in a Customs database, where it was later retrieved by Daniel Dunn, Schmidt's former colleague and current supervisor. Dunn discussed the case with Schmidt after reading Ingleby's report, but testified that he made a "concerted effort" not to discuss the report with Schmidt because Dunn was aware of potential *Kastigar* problems. Finally, Schmidt discussed the Wood conspiracy with investigators from Alabama, who had conducted a second immunized interview of Schmidgall on December 5, 1988. Schmidgall gave no new information on Rock Sound in this second interview.

By sometime in the fall of 1989, authorities in the Southern District of Florida had decided to prosecute

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(when the decision was made to prosecute the Rock Sound venture in the Middle District), the Middle District of Florida prosecutors anticipated prosecuting only William Davis and Thomas Barko, other Wood conspirators, in the Middle District of Florida.

importations made by the Wood conspiracy dating back only to January of 1986; because the Rock Sound venture was before this date, prosecution of the Rock Sound matter was taken over by Schmidt and others in the Middle District. Schmidt testified that he did not read the notes of the January 1988 Schmidgall interview after he resumed active investigation of the Rock Sound venture. Schmidt interviewed Jeffrey Hutchinson on December 29, 1989; Hutchinson, who previously had been identified as an associate of Schmidgall, gave further details of Schmidgall's participation in the Rock Sound smuggling.

On February 9, 1990, Schmidt testified before a grand jury regarding Schmidgall's role in the smuggling conspiracy. Schmidt testified again before the same grand jury on June 1, 1990; however, very little new information was elicited. Schmidt was the only witness to give evidence regarding Schmidgall's participation in the Rock Sound venture. Subsequently the grand jury returned an indictment against Schmidgall for his role in the Rock Sound smuggling.

II. The *Kastigar* Hearing

Pursuant to Schmidgall's challenge of his indictment on Fifth Amendment self-incrimination grounds, a hearing was held before a magistrate judge on February 5, 6, and 13, 1991. Testimony was heard from several witnesses, the most crucial being Agent Schmidt. Upon direct examination, the government had Schmidt explain the source of each piece of information from his grand jury testimony regarding Schmidgall. For each fact, Schmidt testified that the source was wholly independent from any immunized statement of Schmidgall. However, Schmidt did admit that he received and "briefly perused" notes of the January 1988 immunized Schmidgall interview; that he was unaware of any potential self-incrimination issues;

and that a majority of the information he presented to the grand jury was learned *after* early February 1988, when he received the notes of the Schmidgall interview.

On cross examination, Schmidgall's attorney also focused on the facts Schmidt presented to the grand jury. In contrast to the government's approach, he pointed out that many of the facts presented by Schmidt were first divulged to the government in Schmidgall's January 1988 statement.

After the hearing, the magistrate judge issued a report and recommendation finding that the government had met its burden of proving that each piece of information presented to the grand jury was derived from a source wholly independent from Schmidgall's immunized statements, and that the information was in no way tainted by the derivative use of immunized testimony. The district court adopted the report and recommendation, and denied Schmidgall's motion to dismiss the indictment. This appeal followed.

III. The Law and its Application to the Facts

A. *Kastigar* and Self-Incrimination Law

[1, 2] When the government seeks to prosecute a witness who previously has given self-incriminating testimony pursuant to a grant of immunity, serious Fifth Amendment questions are raised. In *Kastigar v. United States,* 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972), the Supreme Court held that such a prosecution was allowable, but the prosecution is prohibited from "using the compelled testimony in *any* respect" that would "lead to the infliction of criminal penalties on the witness." *Kastigar,* 406 U.S. at 453, 92 S.Ct. at 1661 (emphasis in original). The Court rejected the position that once compelled

immunized testimony was given, the witness must be granted full transactional immunity. Therefore, when presented with a *Kastigar* challenge, a court's task is to determine whether any of the evidence used against the defendant was in any way derived from his compelled immunized testimony.[5] Once a defendant shows that he has testified under immunity, the prosecution has the burden of showing that its evidence is not tainted; this is done by establishing the existence of an independent, legitimate source for the disputed evidence. *Kastigar,* 406 U.S. at 460, 92 S.Ct. at 1665.

[3-5] To establish a "wholly independent" source, the government must demonstrate that each step of the investigative chain through which the evidence was obtained is untainted. *United States v. Hampton,* 775 F.2d 1479, 1489 (11th Cir.1985). This includes an affirmative showing that none of the evidence presented to the grand jury was derived directly or indirectly from the immunized testimony. *Id.* at 1486. The protection against self-incrimination is violated whenever the prosecution presents a witness whose testimony is shaped—directly or indirectly—by immunized testimony, regardless of how or by whom the witness was exposed to that testimony. *United States v. North,* 920 F.2d 940, 942 (D.C.Cir.1990), *cert. denied,* 500 U.S. 941, 111 S.Ct. 2235, 114 L.Ed.2d 477 (1991). Prohibited indirect derivation includes using immunized testimony to help shape the questioning of another witness. *See Kastigar,* 406 U.S. at 460, 92 S.Ct. at 1664-65 (use of compelled testimony as an investigatory lead or in focusing the investigation on a witness is

[5]Schmidgall's testimony was not compelled or granted pursuant to 18 U.S.C. § 6002, the statute involved in *Kastigar*. However, the Fifth Amendment standard applies to informal grants of immunity such as the one at issue in this case. *See United States v. Harvey,* 869 F.2d 1439, 1450-51 (11th Cir.1989); *Rowe v. Griffin,* 676 F.2d 524, 527 (11th Cir.1982).

barred). A government agent's denials that he made use of the immunized testimony, standing alone, are generally insufficient to meet the government's burden, even if made in good faith. *Hampton,* 775 F.2d at 1485.

[6, 7] Although the government's task has been characterized as a "heavy burden," it is clear that the government is required to prove an absence of taint only by a preponderance of the evidence. *United States v. Byrd,* 765 F.2d 1524, 1529 (11th Cir.1985). Negation of all abstract possibility of taint is not necessary. *Id.* Further, this Circuit has adopted the "evidentiary" interpretation of *Kastigar:* that the focus of a challenge on self-incrimination grounds should be on the direct and indirect evidentiary uses of immunized testimony, rather on non-evidentiary matters such as the exercise of prosecutorial discretion. *Byrd,* 765 F.2d at 1529-31 (disagreeing with *United States v. Semkiw,* 712 F.2d 891 (3d Cir.1983), and *United States v. McDaniel,* 482 F.2d 305 (8th Cir.1973)). Finally even if immunized testimony was in fact used, an indictment or conviction may be upheld on a finding that the use of such tainted evidence was harmless beyond a reasonable doubt. *United States v. Byrd,* 765 F.2d 1524, 1529 n. 8 (11th Cir.1985).

B. Application of Law to Facts

[8] *1. Notes of the Schmidgall interview.*— Schmidgall's most forceful claim is that the government has failed to prove that Schmidt did not use the notes of the Schmidgall interview supplied by Ingleby to shape the questioning of other witnesses, whose testimony in turn was used by Schmidt in front of the grand jury. The *Kastigar* hearing included a line-by-line, item-by-item examination of Schmidt's grand jury testimony. However, in this examination, Schmidt only pointed to his interviews with witnesses other than Schmidgall; he did not show that

the questioning of these witnesses was not influenced by the notes of the Schmidgall interview.

Schmidt did testify that he merely "perused" the notes upon receiving them in February 1988, garnering no substantive information from them, and thereafter never retrieved the notes from his files. The magistrate judge accepted this testimony, noting that it was corroborated by the fact that "at that time" (presumably February 1988, when Schmidt received the notes), Schmidt "was not aware that the Rock Sound incident would be prosecuted in the Middle District of Florida." Magis. R & R at 11.

However, the testimony at the *Kastigar* hearing casts doubt upon this finding. Schmidt did testify that he did not review the notes *after* his initial perusal because it had been agreed earlier that the smuggling ventures overseen by Fabio Ochoa, of which Rock Sound was one, would be charged in the Southern District of Florida. On cross-examination, however, Schmidt stated that it was *after* the Wood interviews of April 1988 that it was decided to assign responsibility to the Southern District of Florida. Schmidt stated: "It was after the Wood debriefings. It was probably in May or even after May of '88; early summer, I'm pretty sure it was." *Kastigar* Hearing, Feb. 13, 1991, at 13. There have been no findings of fact in the district court as to the precise time a decision was made to turn over to the Southern District of Florida the relevant prosecution.[6] If the decision to prosecute the matter in the Southern District was not made until May or June of 1988, then this fact cannot corroborate Schmidt's testimony that he had no interest in the Rock Sound episode or in Schmidgall as of the time he conducted the Wood interviews in April 1988.

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[6]We decline to read into the magistrate judge's opinion an implied finding that such decision had been made by February 1988 in light of the very specific testimony of Schmidt on cross-examination that it was after the April 1988 interviews of Wood.

Moreover, our review of the current record reveals no other corroboration.

The government must demonstrate that its questioning of Wood during the April 1988 interviews was not derived from immunized testimony, and the uncorroborated testimony of Schmidt would not generally be sufficient to carry the burden. Thus, the government must point to some other evidence to corroborate Schmidt's position that he did not utilize the notes of the immunized Schmidgall testimony in his April 1988 questioning of Wood. It is clear, of course, that Schmidt did have access to those notes at that time. Moreover, in the April 1988 interviews Wood apparently did testify concerning matters that had been first revealed to the government during the previous immunized Schmidgall interview.[7] Based on the record as it currently stands, we are unable to sustain the finding that the government met its burden of proving that Schmidt did not use the notes of the immunized Schmidgall interview to shape his questioning of Wood in April 1988.

[9] The record does provide partial corroboration for Schmidt's testimony. During the period of time that Schmidt thought the Rock Sound matter would be prosecuted in the Southern District of Florida—*i.e.*, from May or June of 1988 until the fall of 1989, when prosecution was turned back over to the Middle District of Florida—it does make sense that Schmidt's interest in Rock Sound and Schmidgall would be diminished.

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[7]At the *Kastigar* hearing, the government did not attempt to demonstrate that its questions to Wood in April 1988 were not derived from the prior immunized testimony. The record on appeal contains only summaries of the interviews with Wood and thus does not reveal the precise questions that were asked.

However, we find no evidence corroborating Schmidt's diminished interest either before that time or after.[8]

2. Continued contact with other agents.— Schmidgall's second allegation of taint involves Schmidt's continuing contact with other investigators who were directly or indirectly exposed to immunized testimony. He claims that these investigators may have discussed with Schmidt matters they first learned from protected testimony, and that Schmidt later used this information to shape his further investigation. Therefore, Schmidgall claims, Schmidt's "fund of information" was tainted, leading to the derivative use if immunized testimony.

The magistrate judge found that Schmidt testified convincingly that he relied upon wholly independent sources during his investigation, and that there was no evidence to support Schmidgall's contention of taint. As we have explained, Schmidt was able to identify sources other than immunized statements for his grand jury evidence at the *Kastigar* hearing. However, the government made no showing that the questioning of these other sources was in no way influenced by immunized testimony. The burden of proof remains with the government; the defendant is not required to present evidence that the grand jury testimony was in fact tainted. As with the allegation regarding the Schmidgall notes, the record is insufficient to support a finding of absence of taint.

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[8]Schmidgall also claims that the government impermissibly used the immunized testimony to corroborate Wood's information—that is, to assure itself that Wood was telling the truth. It is alleged that this type of mere corroboration violates *Kastigar*. *See United States v. Carpenter*, 611 F.Supp. 768, 779-80 (N.D.Ga.1985). We do not agree. *Carpenter* apparently adopted the type of "non-evidentiary" interpretation of *Kastigar* that subsequently was disapproved by this court in *United States v. Byrd*, 765 F.2d at 1529-31. This argument of Schmidgall fails because it does not focus on the source of the evidence actually used to obtain the indictment.

[10] For the foregoing reasons, we conclude that the judgment of the district court must be vacated and the case remanded for further proceedings. As we have observed, in general a government agent's bare denials that he used the immunized testimony are insufficient to meet the government's burden. *United States v. Hampton,* 775 F.2d 1479, 1485 (11th Cir.1985). Considering the explanatory nature of Agent Schmidt's testimony, this case is not a "bare denial" case, however. And, the government is not required to negate every possibility of taint. *United States v. Byrd,* 765 F.2d 1524, 1529 (11th Cir.1985). The government's burden of proof is by a preponderance of the evidence. *Id.* Nothing in this opinion is intended to imply that the government must produce more than a government agent; for example, an agent's testimony can be sufficient when it is adequately supported by (that is, consistent with) the facts and circumstances of the particular case. But in the case before us, some confusion in the record concerns us, especially confusion arising from the inconsistent evidence about the period in which the Southern District was responsible for prosecuting the Rock Sound matter, thus leaving little evidence in the present record to establish for that period of time anything more than Agent Schmidt's mere denial.

C. Further Proceedings

Due to our holding that the government has not carried its burden of proving that Schmidt did not use the notes of the January Schmidgall interview to shape his questioning of Wood or other witnesses, nor of proving that Schmidt did not obtain and use tainted information from other agents, we are unable to sustain the finding that Schmidt's grand jury testimony was not tainted within the meaning of *Kastigar*. We therefore vacate and remand this case. *See United States v. Harvey,* 869 F.2d 1439, 1445 (11th Cir.1989); *United States v. North,* 910 F.2d 843, 872-

73 (D.C.Cir.1990); *cf. United States v. Hampton,* 775 F.2d 1479, 1491 n. 54 (11th Cir.1985) (declining to remand after reversing the district court's finding of no taint, "[g]iven the peculiar circumstances of this case"). On remand, if the prosecution is to continue, the district court must inquire whether Schmidt's questioning of witnesses was in any way shaped by his exposure—through the Clark notes or contacts with other agents—to Schmidgall's immunized statement of January 26, 1988.[9] If the government is unable to disprove taint by a preponderance of the evidence, the court must then determine if any tainted evidence was actually used by Schmidt during his grand jury testimony. *See United States v. Byrd,* 765 F.2d 1524, 1530-31 (11th Cir.1985). Finally, if tainted evidence was presented to the grand jury, the district court must consider whether its use was harmless beyond a reasonable doubt.[10] *Id.* at 1529 n. 8.

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[9]Of course, the government must prove a lack of taint from the second Schmidgall statement of December 5, 1988 as to any evidence gathered after that date and used by Schmidt during grand jury proceedings.

[10]Judge Kravitch suggests that this case should be remanded only for the limited purpose of a harmless error analysis because the government has been given every opportunity to disprove taint. Of all the *Kastigar* cases in courts of appeals, only a handful are outright reversals with directions to dismiss the indictment or reverse the conviction without allowing further proceedings. *See, e.g., United States v. Hampton,* 775 F.2d 1479 (11th Cir.1985); *United States v. Poindexter,* 951 F.2d 369 (D.C.Cir.1991); *United States v. Palumbo,* 897 F.2d 245 (7th Cir.1990). In every case ordering outright reversal, the opinion indicated that there was a clear use of immunized testimony and that further proceedings would be futile. This type of circumstance does not apply in the instant case. The question of whether the government carried its burden of showing lack of taint is close, *e.g.* hinging upon inconsistent evidence about the period of time for which the Southern District was responsible for prosecuting the Rock Sound matter. As we note in the body of the opinion, there are several viable issues that the district court must address: the existence of taint, whether such tainted

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[11] Schmidgall alleges that agents seeking to avoid a *Kastigar* violation must either rely solely upon information obtained before the immunized statement was given or adopt procedures to ensure that there is not any use of the immunized statement or evidence derived therefrom. Because Agent Schmidt did neither, Schmidgall claims that the inevitable result was a *Kastigar* violation. If this argument is accepted, a remand clearly would be futile.

In support of this contention, Schmidgall cites this court's opinion in *United States v. Hampton*. *Hampton* does state that when the government uses information that was gathered after an immunized statement was given, the government as a practical matter usually must show that "prosecuting officials and their agents were aware of the immunity problem and followed reliable procedures for segregating the immunized testimony and its fruits" from prosecuting officials. *Hampton,* 775 F.2d at 1490. Because the relevant authorities in this case were not aware of a potential *Kastigar* problem until sometime in 1990, Schmidgall claims that the resulting failure to insulate the immunized testimony presents a *per se* case of taint.

We do not interpret *Hampton* as laying down such an inflexible rule. That case involved widespread circulation of immunized testimony over a long period of time; the court noted that it was practically impossible for the government to trace each piece of information to an independent source. *Hampton,* 775 F.2d at 1490. Faced with a situation such as that in *Hampton,* the government is forced to rely either on information obtained before the immunized statement or on a reliable insulating procedure. Here, however, we have

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evidence was used by Schmidt before the grand jury, and whether any such use was harmless. Obviously, if the government does not think that the required proof can be made, the proceedings will be dropped.

a much closer case. The amount of information contained in the immunized statement and its circulation were not so widespread as to make the government's burden of tracing "virtually insurmountable," *Hampton,* 775 F.2d at 1490. Indeed, Schmidgall's counsel admitted at oral argument that it was possible the evidence used before the grand jury was untainted (although he strenuously argued that the government had failed to prove this). We therefore find that *Hampton*—from which this case is distinguishable—did not establish a *per se* rule of taint.

CONSIDERATION OF PAROLE DURING SENTENCING

[12] Schmidgall was sentenced to concurrent six-year terms on the two counts to which he pleaded guilty. This sentence was, on its face, longer than that imposed upon co-conspirators. However, the court noted that the co-conspirators were sentenced under the United States Sentencing Guidelines and would serve the full terms of their sentences (with a small allowance for good behavior), whereas Schmidgall was sentenced under pre-Guidelines law and would be eligible for parole. Taking this difference into account, the court termed any apparent disparity in sentencing "illusory." Schmidgall claims that the court made a "groundless inference" that Schmidgall would be paroled, necessitating resentencing.

[13, 14] We find Schmidgall's claim without merit. The six-year sentence is well below the applicable statutory maximum of twenty years. *See* 21 U.S.C. §§ 841, 960 (as in effect at the time of the offense). A sentence within the statutory limits will not be questioned on appeal absent a "showing of arbitrary or capricious action amounting to a gross abuse of discretion." *United States v. Giltner,* 972 F.2d 1563, 1564 (11th Cir.1992), *cert. denied,* ___ U.S. ____, 113 S.Ct. 2383, 124 L.Ed.2d 286 (1993). A

defendant may not be sentenced based on groundless inferences. *United States v. Lopez,* 898 F.2d 1505, 1512 (11th Cir.1990).

Schmidgall claims that the "groundless inference" in the present case is that he will in fact be paroled. A review of the transcript of the sentencing hearing reveals that the district court based its decision on the undisputed fact that the sentence will be parolable, along with the assumption that parole may in fact be granted. This is not the type of groundless inference that a sentencing court is prohibited from making. The Seventh Circuit has held that a sentencing court may consider the availability of parole. *United States v. Plain,* 856 F.2d 913, 918 (7th Cir. 1988); *United States v. Neyens,* 831 F.2d 156, 162 (7th Cir.1987). Schmidgall proposes no compelling reason for differing from the Seventh Circuit's holdings. We find that the sentencing court did not abuse its discretion.

CONCLUSION

On the record before us, we are unable to agree that the United States met its burden of proving by a preponderance of the evidence that none of Schmidgall's immunized testimony was used in obtaining the indictment against him. We therefore vacate the district court's holding and remand for future proceedings consistent with this opinion. Provided the government carries its burden, we find no error in the imposition of the sentence.

VACATED AND REMANDED.

KRAVITCH, Circuit Judge, concurring in part and dissenting in part:

I agree that the government failed to disprove taint as required by *Kastigar,* and I join the court's opinion to that extent. I disagree, however, with the majority's disposition of the case, remanding to the district court for a further evidentiary hearing. Another *Kastigar* hearing serves only to afford the government a second opportunity to carry a burden it did not bear the first time around.

The cases cited by the majority do not, in my view, lend support for an additional hearing in this case. In *United States v. Harvey,* 869 F.2d 1439 (11th Cir.1989) (en banc), we remanded for a hearing because "the record reveal[ed] that the magistrate did not permit the government to show the independent sources of its evidence against Harvey . . . . [The district court's dismissal of the indictment] was premature without giving the government the opportunity to meet its burden under *Kastigar." Id.* at 1445. Similarly, in *United States v. North,* 910 F.2d 843 (D.C.Cir.1990), the court remanded for a hearing because of its "great[ ] concern [over] the District Court's decision not to hold a full-blown, item-by-item *Kastigar* hearing." *Id.* at 872.

Here, by contrast, the magistrate judge held a full and fair, three-day *Kastigar* hearing at which the government was given every opportunity to present evidence that Agent Schmidt's grand jury testimony was wholly uninfluenced by Schmidgall's immunized statement. The government concedes that at this hearing "Agent Schmidt testified as to the source of every fact that had been presented to the grand jury regarding the defendant." Brief of Appellee at 3. The government also presented documentary evidence and the testimony of Agent Dunn and witnesses Wood and Hutchinson. In my opinion, therefore, this case is akin to *United States v. Hampton,* 775 F.2d 1479 (11th Cir. 1985), in which we declined to order a further *Kastigar* hearing, holding that "[t]he

government had ample opportunity to attempt to satisfy its burden under *Kastigar* in the lengthy hearing in the court below." *Id.* at 1491 n. 54.

I would remand the case solely for the district court to perform a harmless error analysis, the government having failed to establish that it did not violate Schmidgall's rights under the Fifth Amendment as construed in *Kastigar*.*

*If the *Kastigar* error is determined to be harmless, I concur in the court's treatment of the sentencing issue in this case.

[FILED JAN 13 1992]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CR90-PT-261-S
NORTHERN DISTRICT OF ALABAMA

UNITED STATES OF AMERICA,

Plantiff,

v.

CHRISTIAN SCHMIDGALL,

Defendant.

MEMORANDUM OPINION

This cause comes on to be heard on what has apparently become universally known as a *Kastigar* hearing.[1] The *Kastigar* case involved the claim of the defendant that the grant of "use" immunity pursuant to 18 U.S.C. § 6002 was not co-extensive with the scope of the Fifth Amendment privilege against compulsory self-incrimination. In the course of determining that the statute is constitutional and that its provision for use and derivative-use immunity is coextensive with and suffices to supplant the Fifth Amendment privilege, the Court enunciated the type protection to which a defendant who has been granted "use" immunity is entitled.[2]

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[1]*Kastigar v. United States*, 406 U.S. 441 (1972).

[2]Earlier, these hearings could have been called *"Counselman"* hearings. *Counselman v. Hitchcock*, 142 U.S.547 (1892), established the principle that a witness compelled to give testimony under immunity must be protected "from future prosecution based on knowledge and sources of information obtained from the compelled testimony." *Id.* at

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Although this case involves neither 18 U.S.C. § 6002 nor compelled testimony, the Government appears to acknowledge that, if immunity was promised, at least use immunity must be given.[3] It is thus appropriate to list some of the principles which can be gleaned from *Kastigar*. The court will assume that the principles apply to promised or equitable immunity as well as immunity which is specifically granted pursuant to 18 U.S.C. § 6002. These principles include:

> The privilege has never been construed to mean that one who invokes it cannot subsequently be prosecuted. Its sole concern is to afford protection against being "forced to give testimony leading to the infliction of 'penalties affixed to . . . criminal acts.'" Immunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom, affords this protection. It prohibits the prosecutorial authorities from using the compelled testimony in *any* respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness.

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437. In dictum, *Counselman* suggested, perhaps more broadly than intended, that "transactional" immunity must be given to compel testimony. It was this suggested principle which *Kastigar rejected*.

[3]The Government has conceded that the defendant here is entitled to use and derivative-use immunity for his Miami (Jan. 26, 1988) statement(s). It also agreed that he is entitled to use, but not use-derivative immunity, for his Birmingham (December 5, 1988) statement(s). The Government takes the position that the December 5, 1988 statements are governed only by Rule 11 of the Federal Rules of Criminal Procedure. Any protection to which the defendant may be entitled may fall under the 5th and 14th Amendment due process provisions as well as the self-incrimination provision.

Id., at 441 (emphasis in original).

> But both the reasoning of the court in *Murphy* and the result reached compel the conclusion that use and derivative-use immunity is constitutionally sufficient to compel testimony over a claim of the privilege. . . . As the *Murphy* Court noted, immunity from use and derivative use "leaves the witness and the Federal Government in substantially the same position as if the witness had claimed his privilege" in the absence of a grant of immunity.

Id., at 458-59.

In rejecting the defendant's argument that the use and use-derivative prohibition would be impossible to enforce, the Court stated,

> This total prohibition on use provides a comprehensive safeguard, barring the use of compelled testimony as an "investigatory lead," and also barring the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures.
>
> A person accorded this immunity under 18 U.S.C. § 6002, and subsequently prosecuted, is not dependent for the preservation of his rights upon the integrity and good faith of the prosecuting authorities. As stated in *Murphy*:
>
> > Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing

> that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence." (Emphasis added). 378 U.S. at 79 n. 18.

> This burden of proof, which we reaffirm as appropriate, is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony. (Emphasis added).

Id., at 460.

> The statute, like the Fifth Amendment, grants neither pardon nor amnesty. Both the statute and the Fifth Amendment allow the government to prosecute using evidence from legitimate independent sources. (Emphasis added).

Id., at 461.

> One raising a claim under this statute need only show that he testified under a grant of immunity in order to shift to the government the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources. (Emphasis added).

Id., at 461-62.

> We conclude that the immunity provided by 18 U.S.C. § 6002 leaves the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the

> Fifth Amendment privilege. The immunity therefore is coextensive with the privilege and suffices to supplant it. The judgment of the Court of Appeals for the Ninth Circuit accordingly is *Affirmed*.

Id., at 462.

Kastigar establishes that the real issue here, as to any statements arguably obtained on promise of immunity, is whether the Government has met its burden of showing that its evidence presented to the grand jury is not tainted. It can do this only by meeting its affirmative duty to prove that the evidence it has used (and proposes to use) was derived from a legitimate source wholly independent of the statements of the defendant given pursuant to a promise of immunity. The key word is "use." The precluded use would include not only use of the statements but also its use as an investigatory lead which leads to other evidence against the defendant or in a manner which causes it to focus its investigation on the defendant. *Kastigar* does not suggest that law enforcement officers or prosecutors who receive the statements, directly or indirectly, somehow become so individually "tainted" that they cannot stay involved if they restrict the use of immunized statements. To the contrary, in rejecting the defendant's argument that the prohibition on use cannot be enforced, the Court implicitly rejected such a position.[4]

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[4]The Court paraphrased Kastigar's argument as follows: It will be difficult and perhaps impossible, the argument goes, to identify, by testimony or cross-examination, the subtle ways in which the compelled testimony may disadvantage a witness, especially in the jurisdiction granting the immunity.

Id., at 459.

Since the defendant here relies significantly on *U. S. v. Hampton*, 775 F.2d 1479 (11th Cir. 1985), the court will quote selected portions of that opinion.

> Pursuant to the subpoena, Mr. Hampton testified before the grand jury on November 5, 1979.
>
> * * *
>
> Under Florida law, since this testimony was given pursuant to a subpoena, it resulted in automatic transactional immunity from state prosecution. *See* § 914.04, Florida Statutes.

Id., at 1480.

> On June 23, 1981, the Lee County Grand Jury transcripts, including transcripts of Hampton's immunized grand jury testimony, were turned over to a federal grand jury in Orlando as part of the ongoing federal investigation. Thereafter, the state materials were accessible to numerous federal attorneys and agents, including IRS Agent Thomas Altif, and were used as a basis for further investigation by federal authorities. In addition, federal authorities were briefed by state investigators on several occasions as to the information collected during the state investigation. State investigators discussing the case with federal agents did not inform the federal agents that the state investigation and portions of the materials transferred included immunized testimony, nor did they attempt to separate immunized testimony and its fruits from other information in briefing federal officials.

> Consequently, as they reviewed the information and materials conveyed by state officials and used them as a basis for further investigation, the federal authorities were unaware that portions of the state materials included immunized testimony, and that some of the other evidence and information conveyed by state officials may have been derived therefrom.

Id., at 1480-81.

> While Mr. Christopher [Assistant U.S. Attorney] denied having read any transcript or listened to any tape of immunized testimony, he acknowledged that Ms. Pilleggi may have. Moreover, Mr. Christopher admitted that in preparing his own interrogations of the various grand jury witnesses, he relied heavily upon case summaries and outlines prepared by the federal investigative agents, who admittedly had access to the state investigative files, presumably including the immunized testimony contained therein, and who had admittedly consulted with state investigative officials about the case, all without any cognizance of the fact that some of the materials and information conveyed by state officials may have been derived directly or indirectly from Hampton's immunized testimony. The record further indicates that the federal agents assisted in the preparation and issuances of subpoenas to various grand jury witnesses, and that in doing so the agents relied upon information gleaned from the state investigative files.

Id., at 1481.

> AUSA Robert Powell denied having ever read Hampton's immunized statements or having personally developed any leads from them. However, Mr. Powell admitted that he relied throughout the investigation upon investigative summaries prepared by state officials and upon briefings by Agent Altif and Special Deputy Barr, each of whom admittedly had access to the immunized materials and other information collected by the state after the immunized testimony was given. Powell also conceded that the federal agents upon whom he relied had received the state materials and used them to work up leads in the case some two years before the agents became aware that there were immunity problems with some of the state information.

Id., at 1483.

(The court goes on to mention other prosecutors and agents who had used various immunized statements and summaries related thereto.)

> Thus, even though the *Murphy* court held that a federal prosecution was not automatically barred by a state grant of transactional immunity, it emphasized that the burden lay on the federal authorities to show "that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence." *Id.*, at 79 n. 18, 84 S.Ct. at 1609 n. 18.
>
> Thus, in the case at hand, in order to sustain Hampton's indictment, the government had the

> burden of establishing that all of the evidence presented to the grand jury (and ultimately all of the evidence to be utilized at trial) was derived from legitimate, independent sources. . . . Although *Kastigar* notes that this is a "heavy" burden in practical terms, 406 U.S. at 461, 92 S.Ct. at 1665, subsequent cases controlling in this circuit have made it clear that, in legal terms, the government is only required "to demonstrate by a preponderance of the evidence an independent source for all evidence introduced."

Id., at 1485.

> The *Kastigar* decision itself emphasized that a previously immunized defendant "is not dependent for the preservation of his rights upon the integrity and good faith of prosecuting authorities." 406 U.S. at 460. Moreover, the government's burden is not limited to such "negation of taint"; rather, the government must go further and affirmatively prove legitimate independent sources for its evidence and affirmatively establish that none of the evidence presented to the grand jury was derived directly or indirectly from the immunized testimony. (Emphasis added).

Id., at 1485-86.

> A review of the state investigators' summaries of Hampton's unimmunized statements, which constitute the only evidence available on this record of the contents of those statements, shows that several important matters and details discussed in the immunized testimony of

November 5, 1979, and May 15, 1980, are not reflected in the statements from the preceding March.

* * *

These are just a few examples of the new information contained in the immunized testimony which may have furthered the state and the federal investigation.

Id., at 1486.

Therefore, unless other legitimate, independent sources for all of the evidence presented to the indicting grand jury were established on the record, Hampton's motion to dismiss the indictment should have been granted.

* * *

Since the federal authorities admittedly relied upon the state materials both to further the federal investigation and in presenting the facts to the indicting grand jury, it was incumbent upon the appellee in this case to demonstrate not only that Hampton's immunized testimony was not used by federal officials either directly or as an investigatory lead, but that any other information or materials conveyed by state officials and utilized either directly or indirectly by federal officials was not derived in whole or in part, directly or indirectly, from Hampton's immunized testimony.

Id., at 1487.

> Where the testimony of an immunized witness enables the government to build a case against his co-conspirator, who consequently strikes a plea bargain with prosecutors and agrees to testify against the immunized witness, the testimony of the co-conspirator must be deemed to have been indirectly derived from the testimony of the immunized witness in violation of *Kastigar*.

Id., at 1488.

> *Kastigar* and its progeny require dismissal of an indictment of a previously immunized witness unless the government can demonstrate that "*none* of the evidence presented to the grand jury is derived, directly or indirectly, from the immunized testimony. . . . (Emphasis added).

Id., at 1489.

> Neither speculation nor conclusory denials of use or derivative use by government officials will substitute for the affirmative showing of an independent source required for each and every item of evidence presented to the indicting grand jury. Each step of the investigative chain by which the evidence presented was obtained must be documented and accounted for. The prosecutor who obtained the indictment may never have seen the immunized testimony and may believe in good faith that no one associated with the federal prosecution has utilized it but that is not enough. Such a disclaimer does not preclude the possibility that someone who has seen the

compelled testimony was thereby led to evidence that was furnished to federal investigators."

Id., at 1489-1490.

> Unless the government relies solely upon evidence obtained prior to the immunized testimony, *cf. United States v. Byrd, supra*, the principles of *Kastigar* generally require (as a practical matter) a showing that prosecuting officials and their agents were aware of the immunity problem and followed reliable procedures for segregating the immunized testimony and its fruits from officials pursuing any subsequent investigations. In the case at hand, no such showing was made, and the government's burden of affirmatively proving independent sources therefore appears to have been virtually insurmountable. (Emphasis added).

Id., at 1490.

Defendant also significantly relies upon *U.S. v. Harvey*, 869 F.2d 1439 (11th Cir. 1989). This court will not quote from *Harvey* the general principles already quoted from *Kastigar* and *Hampton*, but will quote only additional principles enunciated in *Harvey* and some of the circumstances related thereto.

> The magistrate did not allow the government to show that it had derived the evidence it presented to the grand jury—or that it intended to introduce at trial—from legitimate independent sources.

* * *

> Even though she had refused the government the opportunity to demonstrate that the evidence against Harvey came from a source independent of the immunized testimony, the magistrate concluded that the evidence presented to the grand jury was "tainted."
>
> * * *
>
> Informal grants of immunity are by their very nature less certain than formal grants, and thus are much more likely to create confusion for the government and for the courts in the future. As long as prosecutors continue the practice of unwritten grants of immunity, they open the door for subsequent litigation such as this, and for adverse decisions as well. (Emphasis added).

Id., at 1443.

> Although federal law no longer provides for formal statutory grants of transactional immunity, a prosecutor may, as in this case, informally grant transactional immunity to a witness in return for his cooperation in a criminal case. Similarly, although 18 U.S.C. §§ 6002-6003 provide for court-supervised grants of use immunity, prosecutors may extend such immunity informally as well. . . .
>
> [W]e apply the same rules and method of analysis to an informal grant of use or transactional immunity as we would to a formal grant. . . .
>
> In contrast to transactional immunity, use immunity does not prohibit the government from prosecuting the witness for crimes about which

> he testified, provided the government proves that it has other evidence to support the prosecution that "is derived from a legitimate source wholly independent of the compelled testimony."

Id., at 1444.

> The government contends that it derived the evidence it used to secure Harvey's indictment by the grand jury and the evidence it intended to use at trial from an independent source. In essence, the government claims that while investigating someone else the Criminal Tax Division of the Justice Department came upon a trail of evidence that led to Harvey's bank account in the Cayman Islands.
>
> * * *
>
> For the same reason, any conclusion that tainted evidence sufficient to justify dismissing the indictment was presented to the grand jury was also premature because the government may have been able to demonstrate that the evidence was not tainted at all. (Emphasis added).

Id., at 1145.

Defendant also cites *U. S. v. Carpenter*, 611 F.Supp. 768 (N.D. Ga. 1985). Pertinent quotes from that case follow.

> In divining the terms of the government's promise of immunity, the court is guided by the principle that "any ambiguity over the terms of such a promise should be resolved in favor of the criminal defendant." *Rowe*, 676 F.2d at 526 n. 4.

> *See also United States v. Quatermain*, 613 F.2d 38, 46-47 (3rd Cir.1980) (Aldisert, J. Dissenting). Moreover, it is clear that any evidence of guilt induced by an equitable grant of immunity, although not compelled by court order as in the case of testimony given pursuant to the federal use immunity statute, is "coerced" testimony for fifth amendment purposes.

Id., at 776.

> There is no reason to impose any requirement that is less stringent than that set out in *Kastigar* simply because the grant of immunity herein at issue was informal and not pursuant to statute. It is inappropriate to require Carpenter to show that he has been "prejudiced" once he has given compelled testimony pursuant to an immunity agreement.

Id., at 777.

> The government has failed to carry the heavy burden mandated by *Kastigar*. The Fifth Amendment protects an individual who has provided immunized information form having that information used against him "in *any* respect." *Kastigar v. United States*, 406 U.S. at 453, 92 S.Ct. at 1661 (emphasis in the original). The mere existence of a so-called "independent" source for the government's evidence does not end the inquiry; the source must be "*wholly*" independent. Id. at 406, 92 S.Ct. at 1665. Thus, if the information developed from the so-called "independent" source was obtained even indirectly as a result of "focusing" the inquiry made to that source, then there has been

derivative use of the immunized information in violation of the defendant's fifth amendment rights.

* * *

Another indirect use proscribed by *Kastigar* is the fact that immunized information may confirm what the government already knows. *United States v. Dornau*, 359 F.Supp. 684, 687 (S.D.N.Y. 1973), notes that even though the government may have already known everything which the immunized witness provided, the mere fact that the immunized witness corroborated previous information and assured the government that its case was "complete," was a type of indirect use from immunized information which the government would not have otherwise enjoyed.[5]

While the government's identification of Larson, Davidson and Kincaid as potential witnesses may not be easily traced to Carpenter's immunized information, the government cannot say with the same assurance that the questioning of these witnesses, at least as it related to Carpenter, was not "focused" by the information which had been provided by Carpenter. Trial attorney Abbott has admitted that when he questioned Larson, Davidson and Kincaid, he already knew from the immunized information that Carpenter had given in East St. Louis that Carpenter had been involved in the making of bonds for various Company individuals, including the bonds that were made in South Carolina to release Davidson and Kincaid.

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[5]This court does not glean such a holding in *Kastigar*.

Id., at 779-80.

> Knowing precisely the defendant's explanation of what happened is of invaluable assistance in focusing the investigation, deciding what questions to ask witnesses, determining what plea bargain to offer, interpreting evidence, planning cross examination, and otherwise generally planning trial strategy.

Id., at 779.

> The mere fact that the immunized witness corroborated previous information and assured the government that its case was "complete" was a type of indirect use from immunized information which the government would not have otherwise enjoyed.[6]

Id., at 779.

Pertinent quotes from *Rowe v. Griffin*, 676 F.2d 524 (11th Cir. 1982), follow. The case has particular pertinence with regard to the possible ambiguity appertaining to the December 5, 1988 conference.

> Ambiguity over the terms of such a promise should be resolved in favor of the criminal defendant. The District Court found, and we agree, that at the time Rowe gave information to the state officials he had a reasonable expectation that he would be immune from prosecution. If the promise is binding on the state, it is binding according to those terms. (Emphasis added).

[6]This court does not glean such a holding in *Kastigar*.

Id., at 526 n. 4.

> We note that, under the self-incrimination clause of the fifth amendment, evidence of guilt induced by a government promise of immunity is "coerced" evidence and may not be used against the accused.

Id., at 527.

The question which this court must answer are the following:

1. In obtaining the indictment, did the Government use, directly or derivatively, any of the information provided to the Government by defendant Christian Schmidgall on January 26, 1988 in Miami?

2. Was defendant Christian Schmidgall's information which he supplied to the Government on December 5, 1988 so supplied under promise of use immunity?

3. If the answer to 2 is "yes," the court must answer the same question as to the December 5, 1988 information as is posed in 1 above with reference to the January 26, 1988 information.

Of course, as to the December 5, 1988 information, the Government concedes that, in any event, pursuant to Rule 11 of the Federal Rules of Criminal Procedure, it could not have appropriately used the statements of the defendant in obtaining the indictment. It does not concede that the defendant is entitled to derivative use exclusion on said basis.

After considering the cited n. 4 in *Rowe, supra*, and the admonition at page 1443 of *Harvey*, and the evidence at the

hearing, this court concludes that the defendant, who was not represented by counsel at the December 5, 1988 meeting, is also entitled to equitable use immunity with regard to his statements made at the December 5, 1988 meeting. In view of all the circumstances, including what had occurred in Miami in January 1988, this court cannot conclude, from a preponderance of the evidence, that defendant could not have reasonably felt that he was in the same status with reference to the December 5, 1988 meeting.

While Schmidgall was advised that statement wouldn't be used against him, there is no clear evidence that he was sufficiently advised with reference to "use derivative" concerns or that he could have clearly understood or should have understood that the conference was different from that in Miami. The fact that he was denied "absolution" does not mean that he should have understood that he was denied use derivative immunity. The court cannot find, from a preponderance of the evidence, that Schmidgall was given transactional immunity at any stage.

The difference between use of statements and use immunity could well be ambiguous to an unrepresented person. It is not asking too much for the Government, when seeking Rule 11 "proffers," to have a taped oral agreement or signed written agreement which clearly reflects the understanding. To fail to do so "open[s] the door for subsequent litigation such as this, and for adverse decisions as well." *Harvey*, at 1443.[7]

[7]This court is not unmindful of *U.S. v. Rutkowski*, 814 F.2d 594 (11th Cir. 1987), and *U.S. v. Cusack*, 827 F.2d 696 (11th Cir. 1987). Those cases do not address a situation in which the circumstances could suggest a promise of use immunity.

The court having concluded that defendant is entitled to both use and derivative use immunity as to the January and December 1988 meetings, the court must next apply *Kastigar* and its progeny to the facts of this case.[8] At the hearing, the court requested that the defendant suggest to the court what, if any evidence was presented to the grand jury for which the Government did not have a legitimate, wholly independent source. A summary of defendant's suggestions in this regard are as follows:

1. Agent Coram's use of defendant's testimony given at the Birmingham December 1988 interview. U.S.

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[8]This court can perceive no significant differences between the January 1988 and December 1988 statements of the defendant.

While the court has concluded that both use and use derivative immunity attach to the December 1988 statements of the defendant, it may be a decision without any significance. The court is totally satisfied that the Government had legitimate sources totally independent of the December 1988 statements and that those statements neither brought focus on defendant nor provided investigatory leads which implicate him other than the possibilities with reference to Purvis and/or Chambliss hereinafter addressed.

The focus on Schmidgall began with the Wood and Carlson interviews. There is no indication that anything learned from Schmidgall caused any change in the investigation of him unless, somehow, he provided information with regard to Purvis and/or Chambliss and that the Government took advantage of this information in pursuing Chambliss and/or Purvis without a prior legitimate, independent source for pursuing Chambliss and/or Purvis. There is no question that the Northern District of Alabama offices had initially undertaken a significant independent investigation of Schmidgall and others with reference to the West Alabama operation.

It would appear that the primary purpose of the December 1988 meeting was to attempt to plea bargain and, perhaps, obtain evidence against persons other than defendant. It is not clear that the defendant was aware of the purpose. The court cannot conclude that Schmidgall could have reasonably thought he was given transactional immunity in December 1988. His request to be absolved was clearly rejected. This is somewhat manifested by his decision to abort the interview.

Customs Agent Coram was present when defendant was interviewed in the Northern District of Alabama in 1988. Coram was also a witness before the grand jury which indicted Schmidgall in 1990. Coram had been told not to use defendant's statements made at the 1988 interview or any other non-independent sources in his testimony before the grand jury; however, he was not given this warning until immediately before appearing before the grand jury. Therefore, defendant claims that Coram used defendant's statements in preparing his grand jury testimony and in interviewing other witnesses. Specifically, defendant claims:

a. Coram stated he used his notes in preparing his grand jury testimony without indicating whether he could or did separate defendant's remarks made at the Birmingham interview. Therefore, defendant's statement was part of the "fund" of information which Coram used in preparing his grand jury testimony.

b. Coram used defendant's statements in questioning other witnesses in preparation for the grand jury testimony in violation of *Kastigar*. The defense concludes that Coram used defendant's statement in questioning these witnesses since he covered the same topics in his interview with defendant.

2. Agent Coram and AUSA McLean's use of defendant's testimony given at the January, 1988 Miami interview. Defendant claims that the agents present at the January 1988, Miami meeting failed to segregate the immunized testimony presented at that interview from Agent Coram and McLean, the assistant United States attorney in the Northern District of Alabama who presented testimony to the Alabama grand jury. Consequently, defendant states that Coram and McLean may have relied on information derived from defendant's

statements at the Miami meeting in preparing the case to go to the grand jury in the Northern District of Alabama. Specifically, defendant claims:

a. Lieutenant Hume and Ronald Ingleby of the U.S. Coast Guard who were present at the Miami meeting, discussed Schmidgall's testimony with Coram. Hume and Ingleby also discussed defendant's case with Officer Odom, an officer of the State of Alabama Department of Public Safety in the Southern District of Alabama. Odom allegedly worked closely with Coram and McLean in their investigation of defendant. Therefore, defendant contends that both McLean and Agent Coram may have used information derived from their discussions with Hume and Odom in preparing their case against the grand jury.

b. Officer Ingleby prepared a report of interviews with Wood, the leader of the smuggling venture for which defendant is being prosecuted. Ingleby placed the report on Customs' database. Ingleby used defendant's statement made at the Miami interview in this report to corroborate Wood's statement, a derivative use allegedly prohibited by *Kastigar*. Ingelby also allegedly used defendant's statement to lead Woods to believe that defendant was cooperating with the government, another derivative use allegedly prohibited by *Kastigar*. Coram obtained a copy of Ingleby's report. Therefore, defendant contends that the information in the report which was indirectly derived in violation of *Kastigar* reached Coram and Coram may have used it in preparing his grand jury testimony.

c. Customs Officer Schmidt, who was not present at the Miami interview, was also involved in investigating the Wood organization's drug smuggling incident. Schmidt reviewed the notes of the Miami meeting. He allegedly communicated frequently with AUSA McLean. Defendant therefore claims that Schmidt would most likely have

passed on information he derived from his notes and of the Miami interview to McLean. In turn, defendant claims Coram and McLean may have used this information in preparing their grand jury testimony.

In summary, defendant contends that McLean and Coram may have used information which was indirectly derived from defendant's Miami and Birmingham statements in preparing their grand jury testimony.

Prior to either of the 1988 meetings with defendant Schmidgall, the Government had learned of incriminating evidence against him. This evidence grew out of a multi-state investigation of William Wood and the drug venture led by him. David Carlson was interviewed in November 1987, at which time he told Agent Schmidt of a former airline pilot named Chris who, in December 1985, flew to Alabama with Carlson bringing equipment to monitor radio frequencies. Schmidgall had discussed with Carlson the significance of the equipment which was set up at a ranch in a west Alabama county.

In a November 19, 1987 interview, Wood advised agent(s) of Schmidgall's involvement in the December 1985 West Alabama incident. Wood advised the agent(s) of Schmidgall's operation of equipment to monitor customs, and perhaps other law enforcement frequencies. Wood tied the use of the equipment to the transporting of cocaine to a West Alabama airstrip.

On December 29, 1987, agent(s) interviewed Howard Carrell. Carrell also gave information concerning the West Alabama operation(s) and identified Schmidgall as a radio operator.

Wood was again interviewed on January 12, 1988 and reiterated Schmidgall's monitoring of radios and staying in

contact with Wood as he flew in. The various witnesses discussed above had also, prior to January 26, 1988, given statements involving Schmidgall in other drug ventures in Florida. Schmidgall's January 26, 1988 statement did confirm the foregoing. Some of his December 1988 Birmingham statements did the same.

The issue to be decided by this court is whether the Government used any of the information given by Schmidgall in obtaining the subject indictment. Prior to the grand jury hearing, the Government was aware of the possibility that the defendant would seek to claim a *Kastigar* violation. In view of this, the Government instructed Coram, the only grand jury witness who testified with reference to Schmidgall, to restrict his testimony to matters learned from witnesses *independent* of any statements of Schmidgall.

The court is satisfied that the Government has met its burden of providing by a preponderance of the evidence that it had independent, legitimate sources which predated the January 26, 1988 and the December 5, 1988 meetings. Further, that as to the December 5, 1988 meeting, Coram's presence did not somehow taint him or his testimony before the grand jury.[9] As to the December 5, 1988 statements which Coram was definitely aware of, the Government followed reliable procedures for segregating the immunized testimony and its fruits. There is substantial evident that by December 5, 1988, the only focus on the defendant had occurred and that no investigatory leads were developed from that interview. It is not enough to merely suggest that Coram was somehow tainted by his mere presence. The very fact that the

[9]The only possible exception would be if the Northern District of Alabama authorities first learned of Tony Chambliss and/or Steve Purvis through one of the meetings (January 1988 or December 1988).

meeting was held as a Rule 11 negotiation suggests that there was already the focus.[10]

The court, after considering all the testimony and exhibits, has determined that Coram's testimony concerning Wood was not tainted and that the only remaining issue is whether Coram's grand jury testimony with reference to statements made by Tony Chambless and Steve Purvis had somehow become tainted by the defendant's immune statements. The court concludes that unless the Chambless and Purvis statements (or the obtaining of them) is tainted, there has been no *Kastigar* violation. The court has earlier called for additional briefing on this issue but has not significantly reviewed the evidence in this regard. The court has determined to request that a Magistrate Judge assist the court in bringing "focus" on this final issue.

The Magistrate Judge will be requested to review the evidence and the briefs and to submit to the court a detailed report and recommendation with regard to the following:

1. Did defendant Schmidgall provide leads to the Government[11] which led to the non-independent discovery of Purvis and/or Chambless by Northern District of Alabama authorities?

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[10]The court's reference to Rule 11 is not inconsistent with its conclusion that the December 5, 1988 meeting involved a use derivative concept. The court does doubt the Government's testimony that it was such a meeting. The court just concludes that the purpose could have been ambiguous to the defendant.

[11]References to the Government are to the prosecutors and agents involved in the Northern District of Alabama investigation. Information received by authorities in other districts not made known to the Northern District authorities and agents will not be considered.

2. Did the Government have legitimate, independent (of defendant's statements) sources which led to Purvis and/or Chambless?

3. Were any statements obtained from Purvis and/or Chambless tainted by any information gathered from Schmidgall of which the Government had knowledge?

4. In general, was Coram's testimony with reference to Purvis and/or Chambless tainted within the context of *Kastigar*?

The attorneys for the parties may be given an opportunity to further address the issue. With regard to Purvis and/or Chambless, the Magistrate Judge should consider any lead attributable to Schmidgall (in January 1988 or December 1988) which was not available from legitimate independent sources. The Magistrate Judge need not otherwise consider the Schmidgall statements.

This 13 day of January, 1992.

/s/ Robert B. Propst

ROBERT B. PROPST
UNITED STATES DISTRICT JUDGE

[FILED 92 FEB 20 PM 3:33]

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Case No. CR 90-PT-261-S

UNITED STATES OF AMERICA

vs.

CHRISTIAN SCHMIDGALL

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

On January 13, 1992, the district judge entered his memorandum opinion in the above-styled cause ruling on various issues with respect to the defendant's motion to dismiss the indictment pursuant to *Kastigar v. United States*, 406 U.S. 441 (1972). Four specific issues were referred to the undersigned magistrate judge for consideration and for a detailed report and recommendation to the court. Those four issues, as identified by the district court, are as follows:

1. Did defendant Schmidgall provide leads to the Government [footnote omitted] which lead to the non-independent discovery of Purvis and/or Chambless by Northern District of Alabama authorities?

2. Did the Government have legitimate, independent (of defendant's statements) sources which led to Purvis and/or Chambless?

3. Were any statements obtained from Purvis and/or Chambless tainted by any information gathered from Schmidgall of which the Government had knowledge?

4. In general, was Coram's testimony with reference to Purvis and/or Chambless tainted within the context of *Kastigar*?

Furthermore, the Court offered the following instruction to assist the undersigned in the analysis of these issues:

> With regard to Purvis and/or Chambless, the magistrate judge should consider any lead attributable to Schmidgall (in January, 1988, or December, 1988) which was not available from legitimate independent sources. The magistrate judge need not otherwise consider the Schmidgall statements.

In undertaking to answer these questions from the district court, the magistrate judge has read in excess of 1,000 pages of transcript from three separate *Kastigar* hearings in this district, the Southern District of Alabama, and the Middle District of Florida. Additionally, the court has reviewed numerous investigative reports, notes, and other documents offered as exhibits in one or more of those separate hearings. Based upon this review of the evidentiary material before the court, the magistrate judge finds that the Government's use of information from Tony Ray Chambless was not in violation of *Kastigar* and the line of cases following from it concerning use and derivative-use immunity. Furthermore, although the Government's use of information obtained from Steve Purvis *did* violate Schmidgall's derivative-use immunity, it was harmless beyond a reasonable doubt and does not warrant dismissal of the indictment.

I. Did Defendant Schmidgall Provide Leads To the Government Which Led To the Non-Independent Discovery Of Purvis and/or Chambless By Northern District of Alabama Authorities?

The central factual question presented by this issue is how did the Government come to identify Tony Chambless and Steve Purvis as participants in or witnesses to the December, 1985 cocaine-smuggling venture near Demopolis, Alabama, involving defendant Schmidgall. The defendant's derivative-use immunity may have been violated if statements he gave, and known to Northern District of Alabama authorities, created investigative leads to these witnesses because statements later taken from them were used in part to obtain the present indictment of the defendant.[1]

The initial leads to the identity of these two witnesses came during an extensive debriefing of William Wood by Special Agent Don Schmidt between April 22 and 29, 1988. At paragraph 3, page 18, of Agent Schmidt's Report of Investigation relating to these interviews (Government Exhibit 2), the following notation of information appears:

> In December, 1985 Wood participated in air-smuggling 521 kilograms of cocaine into Demopolis, Alabama, for Fabio Ochoa. Wood, Ochoa, Hartley, DeShaw, Lynn, Merrill, Schmidgall, Barko, Steve Purvis, Rick LNU (a radio specialist and friend of Schmidgall's), Carlson, Carrell, Craig Keaser, Tony LNU (an Alabamian from Demopolis) and Maurichio Ochoa participated in the smuggling venture. Details of this load are more fully described in S/A Mike

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[1]*See Page 10 of the Grand Jury Testimony of Thomas Coram*, dated December 4, 1990.

Holt's (U.S. Customs Service, Birmingham, Alabama) Report of Investigation.

Testimony at several of the *Kastigar* hearings indicate that Customs Special Agent Mike Holt from Birmingham participated in the debriefing of William Wood on April 26, 1988. Although Agent Holt did not prepare his separate investigative report, he was later debriefed himself by Special Agent Thomas Coram on September 19, 1988. Agent Coram's report of his review of Special Agent Holt's interview of William Wood appears in the record as Government's Exhibit 3. Thus, at least as early as April of 1988, William Wood had identified Steve Purvis by name and Tony Chambless by the name "Tony . . . from Demopolis . . . ." Indeed, Wood had given a physical description of "Tony" as being a white male in his mid-thirties, five feet ten inches tall, weighing 180 pounds, and having dark hair and a beard. Wood further indicated that "Tony" worked for a paper company in the Demopolis area. Plainly, Wood's description of "Tony" adequately focused investigating officials on a particular individual living and working in and around Demopolis, Alabama.

The extensive debriefing of William Wood in April of 1988 occurred *after* Schmidgall's Miami statements in January of 1988, but *before* his proffer in Birmingham in December of 1988. It becomes critical, therefore, to determine whether any statements made by Schmidgall in January of 1988 amounted to investigative leads pointing toward Purvis and Chambless.

The only written record of the Miami meeting consists of the handwritten notes kept by Agent Rodney Clark during Schmidgall's interview, which can be found in the record as Defendant's Exhibit 1. Those notes cover statements made by Schmidgall involving multiple smuggling ventures in 1984, 1985, and 1986, but only a

portion of the notes on page 2 and on pages 4 and 5 relate to the December, 1985 cocaine shipment to Sumpter County. At no place are the names Steve Purvis, Tony Chambless, or "Tony" mentioned, leading to the inference that Schmidgall did not identify them. It seems clear that Schmidgall did not know Purvis or Chambless in December of 1985 and did not subsequently identify them in the statements he made in January of 1988. Indeed, the December, 1985 episode was the only time Chambless was involved in any smuggling activities, and Schmidgall had never met him before or since. Although Purvis was involved in other smuggling operations, he worked with Schmidgall only on the December, 1985 venture, and had not met him before then or had contact since. *See Transcript of January 3, 1990, Hearing in Southern District of Alabama*, p. 110. It would appear, therefore, that in January of 1988 Schmidgall did not know Tony Chambless or Steve Purvis well enough to identify them in his statements. Nor has Schmidgall (or anyone else) testified at any time that he identified Purvis and Chambless during his January, 1988 meeting with investigators. Consequently, given the absence of references to Purvis and Chambless in the notes and the lack of any contrary evidence, the court concludes that Schidgall did not give investigative leads to them during the meeting.

Because Schmidgall did not identify either Purvis or Chambless in the January, 1988 meeting, Woods' description in April of 1988 was the first time any investigative lead pointed toward them. Although it occurred after the January, 1988 meeting, the information from Wood in April of 1988 was a separate and independent source leading to Chambless and Purvis. In short, therefore, Schmidgall did *not* provide leads that led to the non-independent discovery of Purvis and Chambless

by anyone, much less by authorities in the Northern District of Alabama.

II. Did the Government Have Legitimate, Independent (Of Defendant's Statements) Sources Which Led to Purvis and/or Chambless?

The discussion above answers this inquiry. In his statements to investigative officers in Miami in January of 1988, Schmidgall did *not* identify either Purvis or Chambless. The notes kept by Special Agent Clark do not refer to either of these participants, although it does refer to numerous other people involved in the smuggling activities with Schmidgall, including Joe Alvarez, Jack Hawes, Bobby Eyster, Floyd Sawyer, "Grice" [Griste?], "Woody," Fabio Ochoa, Gus Salazar, "Julius," "Dana," "Dave," "Mini-Rambo," "Fat Bill," "Joey," Rick Nelson, David Merrill, and Maurichio Ochoa. It is obvious that Special Agent Clark was attempting to document all names identified by Schmidgall during the meeting, yet neither Purvis nor Chambless appear in any form. None of the testimony offered in either of the three *Kastigar* hearings indicates that Purvis and Chambless were identified in the meeting although not noted in Agent Clark's notes. Given the absence of Purvis and Chambless from the notes, the court concludes that Schmidgall did *not* identify Chambless and Purvis during the January, 1988 meeting.

This conclusion is further bolstered by the absence of any reference to Purvis and Chambless in Schmidgall's December 5, 1988, proffer in Birmingham. Government Exhibit 8 is Special Agent Tom Coram's report of Schmidgall's December, 1988 proffer, and it nowhere mentions Purvis or Chambless. Once again, the court can only conclude that Schmidgall did not mention either of them during the December, 1988 statement. Because

Schmidgall testified at the *Kastigar* hearing that his December, 1988 statement was merely a reiteration of what he had told officers in Miami in January, the absence of any reference to Purvis and Chambless in the December, 1988 report implies that they were not mentioned during the January, 1988 discussions.

Because Schmidgall was not the source of investigative leads to Purvis and Chambless, the earliest possible source for those leads was the de-briefing of William Wood during April of 1988. There, Purvis and "Tony" are clearly identified. Consequently, in answer to the court's second issue, the Government *did* have legitimate sources, independent of any of Schmidgall's statements, that led to the identification of Purvis or Chambless.

III. Were Any Statements Obtained From Purvis and/or Chambless Tainted By Any Information Gathered From Schmidgall Of Which the Government Had Knowledge?

Chambless was de-briefed by investigating officers in Birmingham on October 20, 1988, a month and one-half before Schmidgall was questioned on December 5, 1988. If the Chambless statement was tainted in any way, it would have been tainted only as a result of Schmidgall's Miami statements in January of 1988. The statement given by Chambless, however, makes plain that he did *not* know Schmidgall by that name, although he was able to identify Schmidgall from a photograph as being one of the persons involved in the Demopolis episode. Government Exhibit 6 is the investigative report of the Chambless statement in October of 1988. There, Chambless described going to the hunting camp and meeting with Lynn, Purvis, Merrill, and "two individuals he had not seen before that night." Furthermore, one of the individuals he had not seen before

was in a back bedroom of the mobile home "hooking up radios and scanners." Chambless remembered hearing the unidentified man talk on the radio. Later, during the statement, Chambless was shown 21 photographs and asked to identify those that he could. Photograph 16 was a driver's license photograph of Schmidgall. Although Chambless was not able to identify by name the person depicted in photograph 16, he did state that person was the radio operator in the December, 1985 smuggling operation. (*See Government Exhibit 6*, page 19). Because Chambless did not know Schmidgall by name, any reference to statements made by Schmidgall would not have coerced or persuaded Chambless to make the statements he made.

Moreover, the Government has shown by a preponderance of the evidence that no Government agent or prosecutor present during Chambless's statement knew of the contents of the statements made by Schmidgall in Miami. A comparison of the Clark notes of the January, 1988 Schmidgall statement to the October, 1988 Chambless statement reveals that nothing said by Schmidgall was used to prompt, assist, or refresh Chambless in the making of his statement. Chambless's statement contained specific details of Schmidgall's activities at the hunting camp, describing the use of the "back bedroom" of the mobile home as the radio center and that one of the scanners had been placed on top of a television set in the den of the mobile home. Chambless also described the use of several hand-held radios. None of these details are reflected in the Clark notes of the Schmidgall statement. Plainly, Chambless independently recalled these facts without the assistance or prompting of any statements from Schmidgall. Consequently, the court concludes that the information given by Chambless, and in

particular his identification of Schmidgall's photograph,[2] was not tainted by any statement Schmidgall made.

The statement given by Purvis on August 23, 1989, is more problematical to assess. Although there is little indication that Schmidgall's January, 1988 statement may have been used to prompt or assist Purvis's statement, there is a great deal of similarity between it and Schmidgall's December, 1988 proffer. Agent Coram was present at both and wrote both reports of investigation. Both referred to Schmidgall's operation of radios in the bedroom of the mobile home; both referred to a stripped copper wire used as an antenna; and both referred to the use of a scanner on top of a television in the den of the mobile home. The sequence of events and the phrases used to describe those events are remarkably similar.

At least one court has held that the use of immunized testimony or statements to refresh the recollection of other witnesses or to help those witnesses focus or organize their testimony violated the immunity doctrine under *Kastigar*. *See United States v. North*, 910 F.2d 843 (D.C. Cir. 1990), *cert. denied*, ___ U.S. ____, ___ S.Ct. ____, 114 l.Ed. 2d 477 (1991); *see also Gwillim v. City of San Jose*, 929 F.2d 465 (9th Cir. (1991) (dictum). The Circuit Court of Appeals for the District of Columbia noted that *Kastigar* prohibits any use of immunized testimony, either directly or indirectly. Thus, using a defendant's statement to refresh the recollection of other witnesses is an indirect, evidentiary use. The court stated:

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[2]The inclusion of Schmidgall's photograph cannot be said to be a product of his statement in Miami because Wood and Carlson both pointed to Schmidgall as a participant in statements they made in late 1987. Thus, aside from Schmidgall's interview, investigators had earlier, independent sources for focusing the investigation on him.

> If the Government uses immunized testimony to refresh the recollection of a witness (or to sharpen his memory or focus his thought) when the witnesses testifies before a grand jury considering the indictment of a citizen for acts as to which the citizen was forced to testify, then the Government clearly has *used* the immunized testimony.

United States v. North, 910 F.2d 843, 861 (D.C. Cir. 1990), *cert. denied*, ___ U.S. ____, ___ S.Ct. ____, 114 L.Ed. 2d 477 (1991).

In the context of the case now at bar, the question becomes whether the Government used Schmidgall's December, 1988 statement to refresh, coach, prompt, or otherwise assist Purvis when he made his August, 1989 proffer. The burden is upon the Government to affirmatively show that Schmidgall's statements were *not* used to refresh Purvis's recollection. The fact that Special Agent Coram attended and largely conducted both interviews creates a grave problem. That problem is compounded, as noted above, by the striking similarity of descriptions contained in Schmidgall's and Purvis's statements. Finally, a careful review of all of the testimony offered at the *Kastigar* hearings in this and other districts fails to reveal any testimony either supporting or contradicting any conclusion with respect to the use of Schmidgall's statements to refresh Purvis's recollection. There simply is no direct evidence one way or the other on this point. Because the Government bears the "heavy" burden in this regard, the Court must conclude that it has failed to show that the Purvis statement in August of 1989 was not tainted by Schmidgall's December, 1988 proffer.

IV. In General, Was Coram's Testimony With Reference To Purvis and/or Chambless Tainted Within the Context of *Kastigar*?

The Court's analysis of the three previous issues posed by Judge Propst makes clear that Coram's Grand Jury testimony with reference to Chambless was *not* tainted within the context of *Kastigar*. Government agents uncovered Chambless on the basis of legitimate, independent sources, and his interview in October of 1988 was not tainted, assisted, or refreshed in any way be either of defendant's statements or proffers. Thus, to the extent that Coram testified concerning statements made by Chambless, that testimony was not tainted or otherwise the product of any statements made by Schmidgall.

Equally clear is the conclusion that Coram's testimony with reference to Purvis was tainted within the context of *Kastigar*. As explained above, the Government has failed to carry its burden of proving by a preponderance of the evidence that Schmidgall's December, 1988 proffer was not used to refresh the recollection or otherwise assist Purvis in the making of his August, 1989 statement. If there is any evidence on that issue, circumstantial evidence suggests that Schmidgall's statement was used to refresh Purvis. In any event, the Government has failed to negate that possibility. Because, in giving his Grand Jury testimony, Coram relied upon statements made by Purvis, there was an indirect use of Schmidgall's December, 1988 statement. The statement was used to assist Purvis in recalling the pertinent events and, then, his recollections were communicated to the jury in Coram's testimony.

The magistrate judge does not believe, however, that the indictment is due to be dismissed because Coram referred to Purvis's statement during his Grand Jury testimony. References to Purvis appear twice in Coram's

testimony with respect to Schmidgall. At pages 9 and 10 of the Grand Jury testimony, the following questions and answers appear:

> Q. During December of 1985 was Chris Schmidgall observed at the hunting camp which was owned by Turpin, Deshaw, and Lynn, doing anything particular?
>
> A. He set up an antenna there. He set up the equipment there in the mobile home, which is located at the Lynn, Turpin, and Deshaw hunting camp.
>
> Q. Who had observed him doing that?
>
> A. That would have been Tony Chambless and it would have also been Steve Purvis.

See Grand Jury Testimony of Thomas Coram, pp. 9-10. Coram also testified that Purvis was a member of the ground crew employed by Wood to unload the cocaine. (*See Grand Jury Testimony of Thomas Coram*, pp. 10-11). Of these two statement, the latter, Purvis's employment as a member of the ground crew, did not rest upon any recollection refreshed by the use of Schmidgall's December, 1988 proffer. The former statement, however, that Purvis had seen Schmidgall setting up an antenna and other equipment at the hunting camp, might have been the product of a recollection refreshed by Schmidgall's statement, and the Government has failed to negate that possibility.

The use of the Purvis statement, however, does not justify dismissal of the indictment because it was harmless beyond a reasonable doubt. As the Circuit Court of Appeals for the District of Columbia noted in *North*, "[d]ismissal of

the indictment or vacation of the conviction is not necessary when the use is found to be harmless beyond a reasonable doubt." *United States v. North*, 910 F.2d 843, 854 (D.C. Cir. 1990), *cert*, ___ U.S. ____, ___ S.Ct. ____, 114 L.Ed. 2d 477 (1991) (*citing United States v. Serrano*, 870 F.2d 1 (1st Cir. 1989); *United States v. Byrd*, 765 F.2d 1524 (11th Cir. 1985); *United States v. Gregory*, 730 F.2d 692 (11th Cir. 1984), *cert. denied*, 469 U.S. 1208, 105 S.Ct. 1170, 84 L.Ed. 2d 321 (1985)). Plainly, the only import of the Purvis statement referred to by Coram in the Grand Jury testimony was its support for the fact that Schmidgall was at the hunting camp at the time of the December, 1985 smuggling operation. That fact, however, was also supported by the legitimate and independent statements of William Wood and Tony Chambless. Indeed, much of the remaining description of Schmidgall's participation in the operation is drawn expressly from Chambless's statement. It is obvious that if Coram had *never* referred to Purvis, the evidence provided by Wood and Chambless would have been more than adequate to support the indictment returned against Schmidgall. It is, thus, beyond a reasonable doubt that Coram's passing reliance upon Steve Purvis did not cause the Grand Jury to return this indictment where they otherwise would not. Thus, the use of Purvis's possibly tainted statement is harmless beyond a reasonable doubt, and the indictment need not be dismissed because of it.

Recommendations

Based upon the foregoing findings of fact and conclusions of law, the magistrate judge makes the following RECOMMENDATIONS:

1. That the court find as fact that Schmidgall did *not* provide leads to the Government which led to the non-

independent discovery of Purvis and/or Chambless by the Northern District of Alabama authorities.

2. That the court find as fact that the Government had legitimate and independent sources which led to the identification and discovery of Purvis and/or Chambless.

3. That the court find as fact that the statement taken from Chambless was not tainted in any way by information gathered from Schmidgall of which the Government had knowledge.

4. That the court find as fact that the statement taken from Purvis was tainted by information gathered from Schmidgall of which the Government had knowledge.

5. That the court find as fact that although Coram's Grand Jury testimony with reference to Chambless was *not* tainted within the context of *Kastigar*, his testimony with respect to Purvis was tainted but that it was harmless beyond a reasonable doubt not justifying dismissal of the indictment.

Any party may file specific written objections to this report and recommendation within fifteen (15) days from the date it is filed in the office of the Clerk. Failure to file written objections to the proposed findings and recommendations contained in this report and recommendation within fifteen (15) days from the date it is filed shall bar an aggrieved party from attacking the factual findings on appeal.

The Clerk is DIRECTED to serve a copy of this report and recommendation upon each attorney of record in this action.

DATED this 20th day of February, 1992.

/s/ T. Michael Putnam

T. MICHAEL PUTMAN
UNITED STATES MAGISTRATE JUDGE

[FILED 92 MAR 13 AM 10:31]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

CHRISTIAN SCHMIDGALL,

Defendant.

CR90-PT-261-S

MEMORANDUM OPINION

This cause comes on to be further considered after the filing of the Report and Recommendation of the Magistrate Judge and objections by both parties.

Prior to the reference to the Magistrate Judge, this court had carefully and extensively considered the evidence. Attempting to ascertain who learned what from whom at which time is not an easy task. After considering the evidence, this court determined that, although its sense of an ultimate decision had been framed, a fresh perspective in a particular area might be helpful. The Magistrate Judge's Report and Recommendation has served only to reinforce this court's earlier opinions.

It is not necessary to repeat the Magistrate Judge's Report and Recommendation. This court will simply state that it, after a *de novo* review, agrees with it, and hereby adopts and incorporates it.

Defendant's Objections

1. David Hume Affidavit. The alleged Hume notes are not part of the record either in this case or in the Mobile record where they are alluded to. Contrasted with the Hume affidavit are the contemporaneous notes of Special Agent Clark made during the January 26, 1988 meeting. In view of the obvious bias of Hume in favor of defendant and Clark's notes as opposed to Hume's memory, the court concludes that the Government has met its strict burden of proving that the name "Tony" was independently ascertained in an interview of William Wood. (April 1988).

2. Thomas Coram. As this court has previously stated, evidence, not witnesses, becomes tainted. *Kastigar* itself so holds (see previous opinion of this court). The Government having met its strict burden with regard to independent sources as to restricted evidence, the court cannot conclude that Coram's role alone taints the evidence.

3. Harmless error. Even assuming that any reference to Purvis was "tainted," the evidence with reference to the Wood and Chambless statements (untainted for the reasons stated in this court's original opinion and the Magistrate Judge's Report and Recommendation) overwhelms any possible reference to Purvis. The involvement of the defendant here was basically determined in 1987. Any possibility of a slight confirmation by Purvis is obviously harmless.

Government Objection

The court again adopts the Report and Recommendation. The Government did not meet its strict burden by offering specific evidence that Purvis was not influenced by any statements of defendant when Purvis was interviewed in August 1989. The court does not suggest, however, that the Government did not already have, independent of any statements of defendant, the same evidence, with reference to defendant, which may have been determined from Chambless.

Defendant's Motion to Suppress and Dismiss the Indictment ("*Kastigar*" motion) filed on February 26, 1991 will be denied.

DONE and **ORDERED** this 13 day of March, 1992.

ENTERED FOR THE COURT:

/s/ Robert B. Propst

ROBERT B. PROPST
UNITED STATES DISTRICT JUDGE

[FILED 92 MAR 13 AM 10:31]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

CHRISTIAN SCHMIDGALL,

Defendant.

CR90-PT-261-S

ORDER

In accordance with the Memorandum Opinion filed contemporaneously herewith, defendant's Motion To Suppress and Dismiss the Indictment filed on February 26, 1991 is **DENIED**. This cause is set for trial on May 11, 1992 at 9:00 a.m. in Courtroom 5-B, Hugo L. Black U. S. Courthouse, Birmingham, Alabama. If either party feels that the trial should be set earlier because of speedy trial concerns, that party should file a statement so suggesting, on or before March 30, 1992. If no such statement is filed, the court will assume that either such trial date is timely or that, both parties agree that the ends of justice served by giving the parties until May 11, 1992 to prepare for trial outweigh the best interest of the public and the defendant in a speedy trial. Defendant's counsel is directed to determine whether his client wishes an earlier trial date.

DONE and **ORDERED** this 13 day of March, 1992.

/s/ Robert B. Propst

ROBERT B. PROPST
UNITED STATES DISTRICT JUDGE

[FILED SEP 23 1994]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

CHRISTIAN SCHMIDGALL,
Defendant-Appellant.

No. 92-6449

On Appeal from the United States District Court
for the Northern District of Alabama

**ON PETITION(S) FOR REHEARING
AND SUGGESTION(S) OF REHEARING EN BANC**

Before: KRAVITCH, ANDERSON, and EDMONDSON, Circuit Judges

PER CURIAM:

☒ The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

☐ The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure;

Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

☐ A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ [ILLEGIBLE]

UNITED STATES CIRCUIT JUDGE